



MEMO TO: Walter Simpson
Chair, Advisory Council

FROM: Stephen Rosario, CAE
Executive Director
New York Chemical Alliance

RE: Dissenting Opinion Re. Green Procurement “Chemical Avoidance List”

Date: September 11, 2009

As a duly appointed member of the Sustainability and Green Procurement Advisory Council (hereinafter “EO 4 Advisory Council”) established by Executive Order No. 4-2008, representing the business of chemistry in New York and the interests of other business sectors, and pursuant to the rules of procedure recently established by the EO 4 Council, I hereby submit this dissenting opinion in opposition to the Council’s recent recommendation that the proposed “chemical avoidance list” (hereinafter “chemicals list”) be adopted for use by the Interagency Committee, which was also established by the EO 4.

The chemicals and plastics industries are sectors of major importance to New York State’s economy. Our industries employ over 100,000 people throughout the state, and our member companies provide critically important jobs that thousands of working families in New York depend on for the wages and benefits that allow them to pay their mortgages, save for retirement, pay their bills, and send their children to college. Factor in the economic reality that our industries produce 2.5 indirect jobs for every direct job, and the number of New York citizens dependent on our industries’ success for their livelihood, and that number jumps to over 300,000 workers. Our member companies collectively pay millions of dollars a year in property and school taxes that support local governments across New York, not to mention the corporate income taxes that go into the State’s coffers.

This dissenting opinion will seek to address two issues related to the Advisory Council’s recommended list of chemicals that would be subject to bans or restrictions in products purchased by the State. The first issue pertains to the *process* by which this list came about, and the second issue regards the *substance* of the list.

First, I would like to point out that the NYS Chemical Alliance and its member companies are not opposed to providing guidance to the various agencies regarding the use of chemicals in products purchased by the State. What we *do* oppose is the submission of a list of chemicals that was created and steered by a select group of Advisory Council members who did not openly share the full opportunity for others to participate in the process.

PROCESS

The Alliance, along with other representatives, has a significant interest in the work of the Advisory Council. Our organization committed to active participation on the Council, predicated on what we thought would be an open, credible and transparent process.

Regrettably, it is our view that the process that led to the creation and submission of the list has fallen far short of these important principles - principles that I believe Governor Paterson has espoused on more than one occasion as the basis of operation for his administration.

Specifically, I raise the following three issues that need to be addressed with respect to the process used by the Advisory Council:

1. Clear and Open Communication

It came to our attention that select members of the Advisory Council had a conference call with members of the Interagency Committee on Sustainability and Green Procurement (hereinafter “Interagency Committee”), during which these Advisory Council members promoted their views and information in support of the “list of chemicals to avoid”.

It is important that you be aware that not all members of the Advisory Council were made aware of, or invited to participate, in that conference call.

Had I not happened to have a conversation with the Chairman of the Advisory Council, I would not have known about the conference call. It is disturbing that the staff who administers the Advisory Council, as well as the Chairman, did not appear to see any conflict of interest or lack of openness in not notifying the entire membership of the Council about the call.

It is because our association did not have the opportunity to participate in that call that we requested equal time with the members of the Interagency Committee.

2. Inherent Bias for Designating Chemicals without Technical Underpinnings and Opportunity for Stakeholder Participation

There has been no explanation given as to why, after voting to open the meetings of the Advisory Council to the public at its May meeting, the Advisory Council felt compelled to rush approval of this list through at that meeting. During the meeting, the only person with a true technical understanding of chemicals and the manufacturing process was Dr. William Wolfram, Global Director of Regulatory Affairs for SI Group, Inc., headquartered in Schenectady, NY and Board Chairman of the Chemical Alliance. I had invited Dr. Wolfram to provide some modicum of scientific expertise to the discussion which the Advisory

Council sorely lacks. Both of us, along with Advisory Council member Eileen Millett, suggested that individuals with technical knowledge and expertise on both sides should be invited to address the Council on the issue of chemicals in products. Our suggestion was rejected by a majority of the Council members who represent environmental and activist organizations.

When considering the makeup of the Council members, it becomes clear that an inherent bias in support of banning or restricting chemicals exists. As one of the few representatives of industry at the table, our association favors the consideration of objective risk-assessment with respect to chemicals, however, this factual scientific principle was rejected by the NGOs on the Committee.

3. Lack of Guiding Principles and Explanation of the Basis to be Used for Decision Making and Lack of Direction from the Interagency Council

Of particular significance is the general lack of “guiding principles” to be followed by State agencies in reviewing and using the list. We believe it is critical to articulate guiding principles at the outset of the process in order to achieve an outcome that is useful to the agencies and not disruptive to New York companies that produce, or sell products to, the State. We view these guiding principles as key to the success of the Advisory Council’s work if they are to explain the rationale to be used for decision-making regarding purchases by State agencies. There is no doubt that not everyone will agree on all aspects of the guiding principles, however, if the guiding principles are followed, then the various stakeholders should at least have a better understanding of why decisions were made. Shouldn’t that be a key tenet of the Advisory Council’s work?

Secondly, the EO 4 specially directs the Advisory Council to “provide such advice and assistance as the [Interagency] Committee may require.” Having attended most of the meetings of the Advisory Council, I am not aware of any official request or communiqués by or from the Interagency Committee asking the Advisory Council to undertake this effort or for a recommendation regarding a chemical avoidance list. Therefore, we would submit that the Advisory Council is overstepping its permissible authority by taking on a project that has been neither requested nor sought. This manner by which the Advisory Council undertook this effort basically makes this entity the master of, rather than the servant to, the Interagency Committee.

SUBSTANTIVE ISSUES

To reiterate again, the chemical industry supports the goals of the Green Procurement and Agency Sustainability Program. We are a willing partner for the NYS EO4 Interagency Committee and have been active participants in the EO4 Advisory Council. We have organized our substantive comments around the perspective that although chemical hazards certainly exist, the submission of

a Priority Chemical Avoidance List does not, in and of itself, provide the EO4 Interagency Committee with information that is useful in fulfilling the Interagency Committee's obligations under Executive Order No. 4. We therefore have presented an alternative strategy which we feel would provide the Interagency Committee with recommendations that would be used to provide a framework and objective criteria for purchasing products.

Applicability of the "Priority Chemical Avoidance List"

The EO4 Advisory Council serves in an advisory capacity to the Interagency Committee to "..... provide such advice and assistance as the Committee may require." In doing so, it would seem logical that the EO4 Advisory Council would wish to support the goals and objectives of the EO4 Interagency Committee as its core mission. As stated in the Executive Order No. 4, the first steps in the EO4 mandated "Green Procurement & Sustainability" process is to:

- ◆ Generate criteria based procurement specifications and procurement lists
- ◆ Identify priority categories and commodities
- ◆ Establish specific (measurable) goals

In our perspective, the Advisory Council's call to adopt a "Priority Chemical Avoidance List" does not serve the Interagency Committee's needs. It does not provide objective criteria or specifications that could be tied to specific products, services or commodities that might be purchased or used by New York State. Given the list's lack of specificity and connection to specific products, services, or commodities, it is unclear how the "Priority Chemical Avoidance List" would provide a systematic basis for procurement practices the Interagency Committee as claimed by the Advisory Council's memorandum.

We plan to provide more comprehensive information on the various chemical classes prior to/during the next Advisory Council meeting on October 8.

Alternative Strategies

We believe that the EO4 Advisory Council would better serve the Interagency Committee by suggesting it should leverage existing recognized standards in its recommendations that:

- ◆ Recognize risk-based criterion
- ◆ Are tied to specific standards for consumer articles
- ◆ Are measurable and can be identified in the products specifications

As an example, the European Union RoHS (Restriction of Hazardous Substances) Directive offers a balanced approach including risk-based criterion and internationally recognized standard, for limiting hazardous chemical content in certain classes of electronic devices. If used as a model, the following issues would be addressed:

- ◆ Heavy metals such as hexavalent chrome, lead, cadmium, and key flame retardant chemicals in electronic devices is controlled

- ✦ De minimus concentration levels are taken into account in the regulation by specifying an allowable content of 1000 ppm (100 ppm for cadmium) in such devices
- ✦ Compliant products already exist in the market place for purchase and can be easily checked via the Internet
- ✦ The EU battery directive could serve as a model for recycling and re-use, further controlling battery related chemicals

The above examples are only for illustrative purposes. We contend that similar criteria could be developed for other products or services purchased by New York State.

CONCLUSION

Many representatives in the business community I have spoken with about the activities of the Advisory Council in drawing up a blanket list of “chemicals to avoid” share the view that our efforts will continue to be frustrated, as well as a waste of time and resources, if there is never to be any serious consideration of specific *risks* as opposed to the general *hazard-based* approach favored by the members of the Council who pushed the list through. The Interagency Committee has the unique opportunity to take action and make sure that objective risk-based information be considered by the Advisory Council.

Given the fast pace—and selective process—by which this list was created and voted on by the Advisory Council, we ask that Interagency Committee reject this list and send it back to the Advisory Council with a mandate to create a set of guiding principles, as well as to **invite the participation of technical experts who can better inform the Advisory Council and the Interagency Committee about the risks of chemicals in products**. Anything less falls woefully below the due diligence that should be expected of, and practiced by, the Advisory Council.

Any proposed list of “chemicals to avoid” in products purchased by the State should also be open to review and comment by the public before final adoption.

Accordingly, this dissenting opinion is submitted for the record and for submission with the Recommendation to the Interagency Committee.

Thank you for your time and attention to this matter.