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State Crackdown on Toxics Opens Up New Regulatory Work for Lawyers

By Fiona Smith

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California is being hailed as a trendsetter for its ambitious plan to combat climate change by slashing greenhouse gases, but another environmentally conscious revolution is brewing more quietly in the state.

Officials are gearing up to draft "green chemistry" regulations to combat the deluge of little-understood toxic chemicals in everyday products - everything from couches, cosmetics and cleaning products, to baby teething rings and bottles.

Two laws recently signed by Gov. Arnold Schwarzenegger place an enormous task at the feet of the state Department of Toxic Substances Control: develop standards for analyzing the health effects of a vast array of chemicals and figure out safer alternatives.

Only a fraction of the tens of thousands of chemicals in use have ever been studied for their human and environmental impacts, and there has been a growing push by legislators and environmental and public health advocates to ban or restrict certain chemicals.

One law, AB1879, gives the department the power to restrict the use of troubling chemicals, up to an outright ban. The other law, SB509, calls for the creation of a database detailing the hazardous traits of toxic chemicals.

"The green chemistry initiative may end up having a much greater impact than [state] greenhouse gas regulations because it affects consumer products in such a profound and broad way," said Peter Hsiao, a chemical engineer turned lawyer who heads up Morrison & Foerster's green chemistry group. "Ultimately, it will affect all companies that seek to inject their product into the stream of commerce in California."

As with anything this far-reaching, lawyers point to several legal hurdles the regulations may hit as the details get hammered out.

One potential sticking point is disagreements over the scientific data the department will rely on in making decisions, said Claudia Polsky, an environmental lawyer and deputy director of pollution prevention and green technology at the Department of Toxic Substances Control.

"The reality is there is not robust data for chemicals currently under production, and we may have to take some regulatory action without the complete data," Polsky said. "What exactly does the department have to know in order to regulate? I think we're given an enormous amount of discretion to take action in the face of uncertainty, but that doesn't stop anyone from suing."

Another problem could arise from the requirement that toxic substances department analyze alternatives to chemicals it seeks to restrict or ban, an analysis of a chemical's "life-cycle" effects, which would include studying its manufacture, its exposure to consumers and workers, as well as its disposal.

"It's going to be really hard to figure out how to implement this alternative analysis," said Timothy Malloy, a professor at the UCLA School of Law who researches chemical policy. "Even if they've done what is a reasonable job of the analysis, it's just one other area where they'll have to defend themselves in court."

The accuracy of information on the toxicological effects of chemicals will likely be subject to intense debate, said Eileen Nottoli, an environmental attorney at Allen Matkins Leck Gamble Mallory & Natsis, who also holds a doctorate in chemistry.

"Clearly everyone will want good science Of course what a good study is, is in the eye of the beholder," Nottoli said. "These evaluations are areas where you can get people second guessing all the time."

The state office of environmental health hazard assessment, charged with creating a publicly accessible toxics database full of chemical and product information, will tread sensitive legal ground, Hsiao said.

"They're going to have to balance the desire to have full toxics information with protection of trade secrets, confidential business information and intellectual property, which is a large part of a company's value," he said. "There will have to be very careful reconciliation between these two ideas."

Consumer products are already regulated in many ways. The green chemistry laws were written to avoid conflicts with federal toxics, labeling and safety laws, but "there will unavoidably be conflict," Hsiao said.

Even with exemptions carved out for pharmaceuticals and foods in the green chemistry law, "it's going to be picking through this minefield of potential preemption issues," he said.

Many of the challenges confronting the Department of Toxic Substances Control are a product of the bill negotiation process where industry groups, who initially opposed the legislation, sat at the table with strong green chemistry proponents, Malloy said.

"The language is very vague and it had to be, to get everybody to agree," Malloy said. "So it left a lot of hard work to be done in the regulatory process."

The toxic substances department will have to transform itself from an agency that has traditionally managed the hazardous waste stream created by chemicals, to one trying to prevent the need for those hazardous substances in the first place.

The new laws are aimed at crafting a comprehensive approach to chemical regulation rather than the chemical-by-chemical or product-by-product approach taken by legislators in recent years. Already, the state has banned phthalates, a plastic softening chemical that can disrupt the function of the endocrine system, from products made for infants; the city of San Francisco has moved to ban the sale of plastic baby bottles containing bisphenol-A, another endocrine disrupting chemical.

The state Environmental Protection Agency, which oversees the Department of Toxic Substances Control, launched a "green chemistry initiative" in 2007 to garner ideas for an overarching chemicals policy. The two green chemistry laws came from recommendations made in the process.

This month, the toxic substances department released a final set of recommendations on green chemistry policy that signal more chemical legislation may be coming down the pipe. The agency is now calling for the creation of a green chemistry workforce, for online disclosure of chemical ingredients in consumer products and a system to rate green consumer products, among other things.

Beyond the concern over gaps in product chemical information, the recent high-profile recalls of melamine-tainted dog food and toys containing lead paint have also fed a desire for better government oversight, Polsky said.

"The number of product recalls have given people some sense of how little retailers know about what the constituents of their products are and the lack of control they have over their supply chains," Polsky said. "They're making people understand how little testing there is and how standardless this all is."

More than 80,000 chemicals are registered for use by the federal Environmental Protection Agency, but few have been thoroughly studied for their health effects. The chemicals registry was created under the Toxic Substances Control Act of 1976 - a law that set out to study and control dangerous chemicals but which is widely seen as ineffective. The federal law is unlikely to interfere with California's new law, lawyers say, but the green chemistry push could get a major boost from a similar effort under way in the European Union since 2007. That law, Registration, Evaluation, Authorization and Restriction of Chemicals, requires manufacturers and importers to submit chemical safety data and empowers the European Union to restrict or ban certain chemicals.

Back in California, the state's long-standing toxics warning law, Proposition 65, already requires businesses to post warnings about the presence of chemicals known to cause cancer, birth defects and other reproductive harm. Also known as the Safe Drinking Water and Toxic Enforcement Act of 1986, Proposition 65 is likely to get a boost from the green chemistry laws, Hsiao said. With the creation of a new toxics chemical database information on Proposition 65 substances will also increase, he said.

But the green chemistry regulations do not contain a private right of action to sue violators, so don't expect the steady stream of litigation as seen under Proposition 65, Hsiao said.

Litigation or not, work in chemicals regulation is taking up more and more of his time, Hsiao said. Morrison & Foerster's

green chemistry group, created about a year ago, has seven lawyers, he said.

"I think it's going to be a growth area for our firm," Hsiao said. "Whenever there's new regulation, and such a far-reaching one like this, there's need for legal counsel."

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