

REPORT OF THE EXECUTIVE ORDER 4 (EO 4) PROCUREMENT SUBCOMMITTEE TO THE EO 4 INTERAGENCY COMMITTEE REGARDING THE ADVISORY COUNCIL RECOMMENDATION TO ADOPT A “GREEN PROCUREMENT CHEMICAL AVOIDANCE LIST”

On December 4, 2009, the Advisory Council presented to the Interagency Committee its recommendation and supporting materials regarding chemicals and procurement. See ogs.state.ny.us/EO/4/Docs/RecommendationOnChemicalsToAvoid.pdf. Advisory Council member Stephen Rosario presented a dissenting opinion, available at ogs.state.ny.us/EO/4/Docs/NYSCA_DissentingOpinionOn_CHEMICALS_LIST_20090914.pdf. Both the majority and minority made presentations at the December 22, 2009, Interagency Committee meeting. At the conclusion of the presentations, the Interagency Committee voted to refer the recommendation to the Procurement Subcommittee (Subcommittee) for further review. This report summarizes that review and attaches the materials provided by the Advisory Council majority and minority in response to a draft proposal prepared by the Subcommittee and shared with the Advisory Council.

The Subcommittee discussed the recommendation in several of its meetings and developed a proposed approach for the consideration of chemicals in the development of green specifications. The Subcommittee describes its proposed approach as follows:

Executive Order No. 4 Interagency Committee on Sustainability and Green Procurement

Consideration of Chemicals in the Development of Green Specifications

Executive Order No. 4 (EO 4) charges the Interagency Committee on Sustainability and Green Procurement with the development of green procurement specifications for use by state agencies and public authorities. When choosing priority categories and developing green specifications, EO 4 directs the Committee to consider, among other factors, commodities, services and technology that reduce or eliminate the health and environmental risks from the use or release of toxic substances; minimize risks of the discharge of pollutants into the environment; minimize the toxicity of packaging; protect public health and the environment, including children; and embody pollution prevention and sustainable production. The primary purpose of identifying chemicals to be aware of in green procurement is to assist the Interagency Committee on Sustainability and Green Procurement (“Committee”) in meeting the goals of EO 4. An added benefit is informing the market of chemicals to be aware of in green procurement.

The federal government has identified chemicals that pose potential harm to human health and the environment. See current U.S. Environmental Protection Agency (EPA) Waste Minimization Priority List (epa.gov/osw/hazard/wastemin/priority.htm), and U.S. Department of Health and Human Services National Toxicology Program, current Report on Carcinogens, List of Chemicals Known and Reasonably Anticipated to be Human Carcinogens (ntp.niehs.nih.gov/index.cfm?objectid=32BA9724-F1F6-975E-7FCE50709CB4C932). In addition, pursuant to the federal Toxic Substances Control Act (TSCA), certain chemicals of concern have been identified by the EPA in Action Plans that outline the risks that each chemical may present and identify specific actions EPA will be taking. (epa.gov/oppt/existingchemicals/pubs/ecactionpln.html).

In accordance with its practice since EO 4 was signed, the Committee shall continue to consider chemicals that pose potential health and environmental impacts, including, but not limited to, chemicals identified in the above sources, when developing green procurement specifications and evaluating existing standards and certification programs. The Committee may, depending on available resources, consider additional information that can be obtained with reasonable effort.

The identification of chemicals to consider in green procurement should not be construed as a ban on the purchase of commodities, services or technology containing and/or using such chemicals. Depending on each commodity, service or technology, and whether sufficient alternatives exist in the marketplace, procurement specifications may restrict or allow considered chemicals to be used or contained in certain commodities, services or technologies (e.g., mercury in fluorescent lamps).

Advisory Council Provides Feedback on Subcommittee Proposal

The foregoing language was shared with the Advisory Council on October 6, 2010, and Advisory Council members were invited to the Subcommittee's October 14 meeting. Advisory Council members Anne Rabe and Stephen Rosario attended, gave presentations and took questions from the Subcommittee. Member Patti Wood arrived while the meeting was in progress, and her written comments described below were distributed at the meeting. The members supplemented their presentations with the following materials:

- Memo dated 10/14/10 from the New York State Chemical Alliance

- Letter dated 10/6/10 from the Center for Health, Environment & Justice; Grassroots Environmental Education; Great Neck Breast Cancer Coalition; Huntington Breast Cancer Action Coalition; Prevention is the Cure; Western NY Council on Occupational Safety & Health

- Updated Summary of Recent Research on Chemicals on the Chemical Avoidance List Recommended by the EO4 Advisory Council October 2010. Summary prepared by Patti Wood and dated 10/3/10.

- Letter dated 10/12/10 enclosing "Preliminary Worksheet on Chemicals for Consideration in Green Procurement." Letter signed by Center for Health, Environment & Justice; Grassroots Environmental Education; Great Neck Breast Cancer Coalition; Huntington Breast Cancer Action Coalition; Prevention is the Cure; Western NY Council on Occupational Safety & Health; and Scot Case of TerraChoice Environmental Marketing. The letter describes the worksheet as providing "contextual information that may be of value to the Subcommittee when they undertake the task of writing specifications."

- Written statement dated 10/14/10 from Patti Wood, Executive Director of Grassroots Environmental Education, hand-delivered at the EO4 Advisory Council Meeting. Statement references the "Preliminary Worksheet" and requests that the Subcommittee include the document in its proposed policy.

- Preliminary Worksheet on Chemicals for Consideration in Green Procurement revised 10/20/10. This document provides additional information that does not appear on the list distributed 10/12. The additional information consists of a legend indicating the source used when developing the column entitled "products/ingredients." This worksheet was circulated at the Advisory Council meeting on October 22, 2010 and circulated to Subcommittee members by email on 11/3/10.

These materials are annexed to this Report as appendices A through F.

The Advisory Council members who recommended the adoption of a list of chemicals to avoid expressed general agreement with the Subcommittee's proposal to refer to the Lists and Action Plans described in its draft document entitled, "Consideration of Chemicals in the Development of Green Specifications," and generally supported the approach described therein. However, the majority

expressed some disappointment that the Subcommittee's draft recommendation does not include the use of the word "avoid," nor does it include reference to a stand-alone worksheet of chemicals developed expressly for use with regard to EO 4, annexed hereto as Appendix F.

Steven Rosario of the NYS Chemical Alliance (Alliance), an Advisory Council member who opposed the Council's recommendation, supported the Subcommittee's language that clarified that the EO 4 approach with regard to chemicals should not be construed as a ban. However, the Alliance expressed the view that the federal government Lists and Action Plans identified as sources in the document are not appropriate for use in developing EO 4 specifications, because they were not developed for purposes that relate to state procurement. The Alliance also expressed its view that proper analysis of the risks presented by listed chemicals and any alternatives thereto must take into account a number of factors, including the tradeoffs presented by substitution of one constituent with another.

Subcommittee Response to Materials and Presentations

The Subcommittee has thoroughly considered the viewpoints and materials provided by the Advisory Council members summarized above, and has determined to present its proposal, entitled "Consideration of Chemicals in the Development of Green Specifications," to the Interagency Committee as written.

With regard to the concerns raised by the majority, the Subcommittee determined not to include the word "avoid" in its recommendation on chemicals, choosing instead to incorporate language taken directly from the Executive Order itself. The Subcommittee was concerned that, in performing its review of a listed chemical in a given item to be procured, it may determine that no viable alternative to a given chemical is currently available. In such a case, it is possible that certain chemicals may not be possible to avoid in all contexts. The recommendation affords the flexibility that may be required when developing specifications for items to be procured by state agencies and authorities with diverse missions.

The Advisory Council majority felt that the worksheet of chemicals it developed for use as a reference list should be incorporated into the Subcommittee's recommendation. The reference list is attached hereto as Appendix F. The Subcommittee agrees that the reference list may prove to be a useful tool when developing specifications. However, the Subcommittee preferred an approach that directly referenced source documents developed by the federal government. While the Subcommittee appreciates the effort that many Advisory Council members put into the creation of an abridged list of

chemicals, it was concerned that including the abridged list in its recommendation could lead to an erroneous perception that New York State has independently adopted its own list of chemicals to consider.

The Subcommittee gave due consideration to the concern raised by the Alliance, that the federal government Lists and Action Plans identified as sources in the document were not developed for purposes that relate to state procurement. The Subcommittee recognizes that the referenced federal government Lists and Action Plans were not developed strictly for purposes related to government procurement. However, the purposes underlying the referenced Lists and Action Plans bear a sufficient nexus to the purposes outlined in Executive Order 4, and the Lists and Action Plans may be useful as resources in the development of specifications that will adhere to the purposes of EO 4. The Subcommittee considered the stated purpose for EPA's Waste Minimization Priority Program, which "supports efforts that promote a more sustainable society, reduce the amounts of waste generated, and lower the toxicity and persistence of wastes that are generated." See epa.gov/osw/hazard/wastemin/index.htm. The Program "focuses its efforts on reducing 31 Priority Chemicals (PCs) found in our nation's products and wastes by finding ways to eliminate or substantially reduce their use in production." epa.gov/osw/hazard/wastemin/priority.htm. In addition, the Subcommittee considered that the U.S. Department of Health and Human Services National Toxicology Program's current List of Chemicals Known and Reasonably Anticipated to be Human Carcinogens in its "Report on Carcinogens," includes many substances that are widely distributed in commerce. Finally, chemicals for which EPA initiates Action Plans under the Toxic Substances Control Act, are chosen using the following criteria: "Chemicals identified as persistent, bioaccumulative, and toxic; High production volume chemicals; Chemicals in consumer products; Chemicals potentially of concern for children's health because of reproductive or developmental effects; Chemicals subject to review and potential action in international forums; Chemicals found in human biomonitoring programs; and Chemicals in categories generally identified as being of potential concern in the new chemicals program." See epa.gov/oppt/existingchemicals/pubs/ecactionpln.html.

The Subcommittee therefore believes it is advisable to use the Lists and Action Plans as resources, while giving due consideration to the purposes for which they were developed and any limitations that may inhere therein. The Subcommittee also expressly states that in developing EO 4 specifications, the Interagency Committee will not be limited to consideration of the Lists and Action Plans.

The Subcommittee has also considered the Alliance's position that mere presence of a chemical in a product or process does not evidence actual risk, and that proper analysis of the risks presented by listed chemicals and any alternatives thereto must take into account a number of factors, including the tradeoffs presented by substitution of one constituent with another. The Subcommittee's recommendation attempts to address these concerns when it acknowledges that "Depending on each commodity, service or technology, and whether sufficient alternatives exist in the marketplace, procurement specifications may restrict or allow considered chemicals to be used or contained in certain commodities, services or technologies." Moreover, the Subcommittee's decision to omit from its recommendation a commitment that it will "avoid" listed chemicals acknowledges that consideration of these substances and any alternatives must be undertaken prior to making a final determination.

For these reasons, the Subcommittee has determined to finalize its draft proposal without modification, and refer the proposal and this Report to the Interagency Committee for further action, as appropriate.