



February 11, 2011

The Honorable Jerry Brown
 Governor of California
 State Capitol
 Sacramento, CA 95814

Subject: Request for Executive Oversight of Recent and Pending Actions by the Cal/EPA Office of Environmental Health Hazard Assessment

Dear Governor Brown:

The organizations represented above are becoming increasingly concerned with a series of recent and significant actions by the California Office of Environmental Health Hazard Assessment (OEHHA) occurring during the transition from the outgoing Schwarzenegger administration to your administration.

These actions cast doubt on OEHHA's use of best available science. They signal a bias toward selective use of scientific methodologies, data and assumptions that yield the lowest possible health reference levels, yet are unlikely to provide any real-world public health benefits.

More importantly, these are not simply routine, scientific advisory recommendations. Rather, they are actions which form the foundation for increasingly stringent environmental regulatory decisions which have profound impacts on consumers, ratepayers, markets for implicated products, jobs and the state economy. The actions enumerated below may also impact your administration's budget priorities, and a policy agenda that is still being formulated. The simple fact that these actions are occurring during a transition period between administrations strongly suggests that they are not receiving the focused consideration they deserve.

We urge you to direct OEHHA to suspend all pending decisions until such time as necessary appointments are made and the appropriate administration staff can engage in discussions with OEHHA, Cal/EPA and other affected agencies to evaluate whether these actions are truly based on the best available science, and how best to mitigate the impacts that would follow from their incorporation in state environmental regulatory decisions.

Following are several examples of pending, proposed and final actions undertaken by OEHHA from late December, 2010, through the end of January, 2011:

- **Proposed hexavalent chromium public health goal (PHG)** – OEHHA is seeking to establish a new PHG of 20 parts per trillion (ppt) for hexavalent chromium (chrome 6) just ahead of new scientific information that will inform OEHHA's understanding of how ingestion of chrome 6 affects humans. The proposed PHG is 2,500 times lower than California's current total chrome drinking water standard (50 parts per billion) and 50 times lower than the state approved limit of detection for chrome 6 (1 ppb or 1,000 ppt). Approximately one third of drinking water sources statewide test positive above the detection limit, the vast majority due to naturally occurring chrome 6. OEHHA's proposal conveys the message that much of California's drinking water supply poses a cancer risk. It will also inevitably lead to a drinking water standard that is much lower than the current standard for total chrome, requiring billions of dollars in new infrastructure investments by public water systems.¹ Since most instances of source water "contamination" by chrome 6 will not be traceable to so-called polluters, water purveyors will have no choice but to sharply increase water rates to cover treatment costs. **OEHHA has set a public comment deadline of February 15, 2011, following which it may adopt a final chrome 6 PHG.**
- **Proposed perchlorate PHG** – OEHHA is seeking to ratchet the perchlorate PHG down from 6 parts per billion (ppb) to 1 ppb, despite acknowledgement by OEHHA that the current 6 ppb PHG is based on a non-adverse health effect. Some samples taken from the lower Colorado River, a major source of drinking water for Southern California, exceed 1 ppb. Low level perchlorate concentrations in excess of 1 ppb may also occur in finished drinking water as a by product of bleach-based disinfection processes used to eradicate deadly water-borne pathogens. OEHHA's proposal conveys the message that a lower concentration will be pursued at all costs, even if it does not result in a public health benefit. OEHHA's proposed reduction in the perchlorate PHG would greatly expand the scope of affected drinking water systems and magnify the costs water purveyors and their rate payers are already shouldering from recently adopted drinking water standards for naturally occurring contaminants such as arsenic. This action will also further erode consumer confidence in agricultural commodities that may contain trace amounts of perchlorate such as leafy green vegetables and dairy products.

¹ State law mandates that drinking water standards be set as close to the PHG as is technologically and economically feasible.

OEHHA has set a public comment deadline of February 23, 2011, for its proposed perchlorate PHG.

- ***Final Proposition 65 Listing of Four-Methylimidazole (4-MEI) as a carcinogen.*** 4-MEI is ubiquitous in today's food supply. It forms unavoidably in the "browning reaction" and is found in food and beverages, including dark beer, soy sauce, molasses, caramel in colas and desserts, coffee, certain baked goods, and many other foods. The OEHHA listing was based on a National Toxicology Program (NTP) technical report that contained conflicting animal data involving extremely high doses which indicated an incidence of tumors in mice and a corresponding decline of tumors in rats at the same exposure level. In fact, the NTP study showed no tumor increases when mice consumed amounts of 4-MEI that would translate into truly stratospheric human doses (i.e., doses that would require people to consume tens of thousands of servings more than would be expected every day of their life). No other government on earth currently requires or recommends product warnings for 4-MEI. **OEHHA decided to act on the 4 MEI listing in late December, 2010, and the listing became final on January 7, 2011.**
- ***Pending Proposition 65 listings for multiple chemicals pursuant to the Labor Code mechanism,*** despite ongoing litigation concerning OEHHA's authority to use this mechanism, and the availability of other listing mechanisms. A principal deficiency of the Labor Code mechanism is that it is ministerial in nature and thus does not allow for consideration of relevant science or qualified listings. The batch of chemicals at issue includes titanium dioxide (TiO₂), a whitening agent found in thousands of foods and cosmetics. TiO₂ is also an active ingredient in sunscreens formulated to prevent skin cancer. As with the 4 MEI listing, Proposition 65 warnings will inevitably scare consumers away from TiO₂-containing products, in some cases to the detriment of public health, and result in shifting market shares affecting global manufacturing companies. **This action is still pending as of the date of this letter.**
- ***Proposed adoption of hazard trait regulations,*** pursuant to California's green chemistry laws, which would create a new classification system for chemical hazard traits and endpoints, ignoring opportunities to harmonize California's web-based "Toxic Information Clearinghouse" with systems already in place in other jurisdictions. The proposed regulations fail to fulfill the SB 509 (Simitian, 2008) statutory mandate to operate this system "at the least possible cost to the state of California". OEHHA's unilateral designation of new hazard traits will expand the scope of California's emerging consumer products regulatory program to a scale that could dwarf the state's climate change program. Ironically, this proposal appears to be entirely disconnected from the "Safer Consumer Product Alternatives" rulemaking process undertaken by Department of Toxic Substances Control to implement AB 1879 (Feuer, 2008). **OEHHA has set a public comment deadline of February 15, 2011 for this proposed regulation.**
- ***Final report on Cumulative Impacts*** will expand the geographic scope of "environmental justice communities" and compel consideration of inherently subjective factors in future regulatory, permitting and enforcement decisions. This report could rival the California Environmental Quality Act (CEQA) as a tool to delay or thwart new construction, redevelopment, facility improvement projects, or the development of brownfields to return them to productive uses. It will also encourage punitive enforcement actions rather than compliance assistance, imposing more new costs and regulatory hurdles on California businesses. **OEHHA issued its final report on December 31, 2010.**
- ***Final styrene PHG*** – set below the current level of detection at 0.5 ppb based on OEHHA's conclusion that styrene is a probable human carcinogen, and despite the fact

that styrene is not a drinking water contaminant.² Moreover, no other governmental body has concluded that styrene is a human carcinogen despite numerous, rigorous reviews by the European Union, Japan and the International Agency for Research on Cancer. Styrene is not listed as a Proposition 65 carcinogen. The effect of OEHHA's action is to set a near impossible goal for water agencies that is based on a scientifically deficient and flawed assessment that failed to consider the entire weight of the scientific evidence. They will be obligated to develop new methods to detect styrene at trace levels when its presence cannot be anticipated at any level. Its absence as a water contaminant means that this PHG cannot result in any public health benefits. It will, however, greatly impact the industries in California that use styrene. Consumers and activist groups are expected to seize on OEHHA's characterization of styrene as a carcinogen to intensify their attacks on styrenic products. **OEHHA issued its final styrene PHG on December 28, 2010.**

- **Proposed CREL for Caprolactam** – OEHHA has proposed lowering by fifty-fold the airborne Chronic Exposure Limits for caprolactam from 0.1 mg/m³ to 0.002 mg/m³. The OEHHA proposal effectively sets more stringent airborne standards for caprolactam than for known human carcinogens. Caprolactam is an upper respiratory tract irritant at high airborne concentrations. It is not a carcinogen. Recognizing its relative safety, the U.S. EPA delisted caprolactam as a hazardous air pollutant in 1996 and European Authorities have recently increased indoor airborne exposure standards by five-fold. The OEHHA proposal runs counter to health hazard assessments by both U.S. and international authorities. This OEHHA action has the potential to cost consumers and carpet manufacturers millions of dollars in additional costs. **OEHHA's proposal was issued on December 27, 2010 and currently awaits approval by the Science Review Panel.**

We also understand that OEHHA plans in the near term to issue **revisions to the public health goals for nitrate and fluoride** based on the same non-adverse human health endpoint as perchlorate. Basing a PHG on non-adverse health effects is extremely precautionary, and may not be scientifically warranted in these instances. Nitrate is ubiquitous in drinking water, and based on relative potency, the current nitrate PHG would be reduced by a factor of 100. A lower PHG for fluoride would create immediate liability for water purveyors who knowingly and intentionally fluoridate drinking water, despite widespread scientific agreement that water fluoridation is one of the most effective and beneficial public health programs of all time.

The cumulative effect of adopting drinking water standards based on the newly proposed and pending PHGs would be to greatly constrain already limited water supplies dedicated to existing uses. Such action would deal a fatal blow to water starved agricultural operations, many new residential and business development projects, and potentially to future environmental restoration and management projects. Unprecedented increases in water rates would constitute a true economic hardship for many ratepayers.

The timing of the above noted initiatives suggests a desire by OEHHA to avoid executive oversight. They also appear on their face to be inconsistent with regulatory reform actions at both the state³ and federal level⁴, and would contribute significantly to the counter-productive regulatory environment you cited during the gubernatorial campaign.⁵

² Styrene is a volatile organic compound, incapable of reaching groundwater or remaining in surface waters.

³ Senate President Pro-Tempore Darrel Steinberg recently announced his intention to sponsor urgency legislation that "directs each state agency to review its regulations, identify any duplicative, archaic or inconsistent rules." Senator Steinberg further stated that it is not his intent to "weaken or undermine public health, environmental or worker safety protections," but rather to make it easier for businesses to "wade through the often difficult, complicated, duplicative bureaucracies that delay economic investment and job growth."

⁴ Improving Regulation and Regulatory Review – Executive Order, January 18, 2011. President Obama's Executive Order contains a number of directives to federal agencies in conducting their

It is imperative that the environmental protection programs in California be based on scientifically objective, accurate and realistic determinations of risks, not hypothetical improbable estimates. Now more than ever, these programs must provide scientifically-sound answers about chemical safety so that risk management actions are clearly justified.

Again, we urge you to direct OEHHA to suspend all pending decisions until such time as necessary appointments are made and the appropriate administration staff can engage in discussions with OEHHA, Cal/EPA and other affected agencies to evaluate whether these actions are truly based on the best available science, and how best to mitigate the impacts that would follow from their incorporation in state environmental regulatory decisions.

We greatly appreciate your consideration of our concerns.

Sincerely,

Agricultural Council of California
American Chemistry Council
American Cleaning Institute
California Building Industry Association
California Chamber of Commerce
California Citrus Mutual
California Construction and Industrial Materials Association
California Cotton Growers and Ginners Association
California Farm Bureau Federation
California Grape and Tree Fruit League
California Grocers Association
California League of Food Processors
California Manufacturers and Technology Association
California Metals Coalition
California Paint Council
California Restaurant Association
Chemical Industry Council of California
Consumer Specialty Products Association
Grocery Manufacturers Association
IFRA North America
Industrial Environmental Association
Lumber Association of California and Nevada
Metal Finishing Association of Northern California
Metal Finishing Association of San Diego
Metal Finishing Association of Southern California
Nisei Farmers League

reviews of existing regulations and in proposing new regulations, including: (1) propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs; (2) tailor regulations to impose the least burden on society, consistent with obtaining regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations; (3) select, in choosing among alternative regulatory approaches, those approaches that maximize net benefits.

⁵ In an article appearing in Legal Newline in November, 2009, then Attorney General Brown raised concerns with excessive regulation in California, stating "it does seem that we're reaching the point of counter-productivity." Attorney General Brown also indicated in a speech to corporate legal officers cited in the same article that environmental and workplace laws and regulations create unnecessary litigation, stating that "the capacity to manage people in society by unending escalation of pervasive legal prescription is questionable."

Pactiv Corporation
Personal Care Products Council
The Carpet and Rug Institute
Western Agricultural Processors Association
Western Growers
Western Plant Health Association
Western States Petroleum Association

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