

**APTCO, LLC's Comments in Opposition to the Proposed Regulatory Concept for
Section 25904, Title 27, California Code of Regulations:
Chemical Listings by Reference to the California Labor Code, July 31, 2013**

*No matter how it is framed, the question a court faces when confronted with
an agency's interpretation of a statute it administers is always, simply,
whether the agency has stayed within the bounds of its statutory authority.*

City of Arlington v. FCC, 599 U.S. ___, (2013)

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July 31, 2013

Via email: P65PublicComments@oehha.ca.gov

George V. Alexeeff, Ph.D.
Director
Office of Environmental Health Hazard Assessment
1001 I Street
Sacramento, CA 95812

**Re: APTCO, LLC's Comments in Opposition to the Proposed Regulatory Concept
for Section 25904, Title 27, California Code of Regulations: Chemical Listings
by Reference to the California Labor Code**

Dear Dr. Alexeeff:

These comments are submitted on behalf of APTCO, LLC, an agricultural packaging manufacturer located in Delano, California, in opposition to the proposed regulation concerning chemical listings by reference to the California Labor Code.

I. INTRODUCTION.

This attempt by California's Office of Environmental Health Hazard Assessment's ("OEHHA") to change the Labor Code Listing Mechanism regulation is not necessary, is not practical and is in fact invalid. Proposition 65 was enacted in 1986 but only now does OEHHA propose to change the way it lists chemicals under the Labor Code Listing Mechanism. Nothing has changed since 1986 in the language of the Proposition 65 statute or the case law to justify OEHHA's reinterpretation of its power. OEHHA has misled the public over the years with various inconsistent interpretations of its Labor Code listing authority when there were substances it desired to list but it did not have the statutory authority to list. The courts therefore have clearly established for the public how OEHHA can list chemicals under Proposition 65 when it refers to the Labor Code.

This regulation is unnecessary. An agency is not permitted to spend substantial time and public funds promulgating a regulation which the public does not need. Cal. Gov. Code §§ 11340(c), 11342.2 (APA). This is not the fundamental problem, however, with OEHHA's proposed regulation. The fundamental problem is OEHHA's misinterpretation of its legal authority.

When OEHHA reinterpreted its authority in the past the courts have said: “[W]hen, as here, an agency does not have a long-standing interpretation of the statute and has not adopted any formal regulation interpreting the statute, the courts may simply disregard the opinion offered by the agency.” SIRC v. OEHHA, 148 Cal. App. 4th 1082, 1099-100 (2012) (quoting State of California v. Unumprovident Corp., 140 Cal. App. 4th 442, 451 (2006)).

Thus, OEHHA’s interpretation is entitled to no deference. This proposed regulation expands considerably the scope of OEHHA’s authority to list chemicals without scientific review and is therefore invalid. An agency is never permitted to expand the scope of its power. APA § 11342.1, .2. This proposed regulation also is invalid because OEHHA did not perform the required Economic Impact Assessment. This would have revealed a significant economic impact to the public, in part because the regulation gives OEHHA the authority to subject a greater number of individuals and businesses to the damaging effect of Proposition 65 warnings. If OEHHA adopts these changes, it may be forced to list automatically a chemical on the basis of “advocacy science” by an agency outside of California rather than on the basis of rigorous scientific methodological review that would uncover mistakes and save California businesses from significant economic harm.

APTCO, LLC does not support OEHHA’s proposed Labor Code Listing Mechanism regulation. It would subject California businesses to unauthorized, unlawful and unconstitutional Proposition 65 listings. If enacted, it would not benefit the California public.

II. SUMMARY OF PRINCIPAL OBJECTIONS.

Proposed Subsection (a)(1). OEHHA proposes to list chemicals under Proposition 65 by reference to the California Department of Industrial Relations Hazardous Substances List (“Director’s List”). OEHHA has never had the statutory authority to list from the Director’s List and cannot enact a regulation which gives itself this authority. Proposed Subsection (a)(1) is therefore invalid.

Proposed Subsection (a)(2). This subsection is ambiguous, and OEHHA does not adequately explain to the public what it proposes to do in this subsection. To the extent OEHHA is proposing to list under Proposition 65 only those chemicals which are identified in the Federal Hazard Communication Standard (HCS) as carcinogens in 29 C.F.R. 1910, subpart Z, this subsection is valid. It is invalid as currently written, however, because it appears that OEHHA is proposing to list chemicals through application of the HCS classification criteria or by reference to safety data sheet information. OEHHA only has the statutory authority to list chemicals which are already identified as carcinogens in the HCS.

Proposed Subsection (a)(3). OEHHA proposes to list chemicals under Proposition 65 which are identified in the National Toxicology Program’s (NTP) Report on Carcinogens (RoC) by reference to the HCS. OEHHA, however, only has the statutory authority to list chemicals which are “identified” by reference to the HCS, and OSHA no longer “identifies” the NTP’s listings as

carcinogens in the HCS. Proposed Subsection (a)(3) is therefore invalid because it impermissibly expands OEHHA's listing authority. OEHHA must stay within the bounds of its listing authority if it desires to list from the NTP's RoC, and it may do so under the Authoritative Bodies Mechanism.

Proposed Subsection (a)(4). OEHHA proposes to list chemicals from the IARC Monographs. To the extent OEHHA proposes to do this by reference only to Labor Code Section 6382(b)(1), this subsection is valid. Because OSHA no longer "identifies" as carcinogens the IARC's listings, OEHHA may not list from the IARC listings by reference to Labor Code Section 6382(d).

Proposed Subsections (b) and (d). OEHHA's proposals regarding public notice, public comment and the delisting process are invalid. They subject the public to an arbitrary and inconsistent process because they conflict with the Proposition 65 statutory listing scheme and with other listing regulations.

General objections. Enactment of the provisions in this proposed regulation which impermissibly expand OEHHA's Labor Code listing authority constitute state and federal constitutional violations, and such provisions would be preempted by federal law. Enactment of the permissible provisions in this proposed regulation is unnecessary because the courts have already clarified for the public how OEHHA is permitted to list chemicals under the Labor Code Listing Mechanism.

III. OEHHA IS BOUND BY THE CALIFORNIA ADMINISTRATIVE PROCEDURE ACT.

OEHHA must comply with California's Administrative Procedure Act (APA) when it adopts a regulation even though it implies several times in its "Initial Statement of Reasons" that it is not subject to the APA. The Safe Drinking Water and Toxic Enforcement Act of 1986 (Proposition 65), Health and Safety Code Section 25249.8(e) provides that OEHHA is exempt from the APA only when it "publishe[s] a list." Section 25249.12(a), however, is the section which is relevant to this proposed regulation. It provides that OEHHA may adopt and modify regulations to implement the statute, but unlike Section 25249.8(e), it does not exempt OEHHA from the APA.

Indeed, California's Office of Administrative Law (OAL) has held that "[r]egulations adopted by . . . OEHHA must be adopted pursuant to the APA" under Proposition 65 Section 25249.12(a). In re OEHHA, OAL File No. 05-1027-05S (2005). OEHHA is subject to the APA. These Comments will show that this proposed regulation is invalid under the APA.

IV. PROPOSED SUBSECTION (a)(1) IS INVALID BECAUSE OEHHA IS NOT AUTHORIZED TO LIST FROM THE CALIFORNIA DEPARTMENT OF INDUSTRIAL RELATIONS HAZARDOUS SUBSTANCES LIST.

A. OEHHA's New Labor Code Listing Method Proposal.

Proposition 65 does not authorize OEHHA to refer to the California Department of Industrial Relations' ("DIR") "Director's List" of hazardous substances as a source to list substances under Proposition 65. Nevertheless, OEHHA has proclaimed for the first time since Proposition 65 was enacted in 1986 that it has the authority to list from the Director's List. Neither the clear language of Proposition 65 nor the clear language of the California Labor Code supports OEHHA's new interpretation of its authority.

OEHHA has drafted the following in Subsection (a)(1) of its proposed regulation:

(a) Pursuant to Section 25249.8(a) of the Act, a chemical shall be included on the list of chemicals known to the state to cause cancer or reproductive toxicity if it is a substance identified by reference in Labor Code Section 6382(b)(1) or by reference in Labor Code Section 6382(d) as causing cancer or reproductive toxicity.

(1) A chemical shall be included on the list if it is on the most recent edition of California Department of Industrial Relations Hazardous Substances List contained in Title 8, California Code of Regulations, section 339, if a basis for the chemical being placed on the Director's List is that the chemical causes cancer or reproductive or developmental toxicity based on sufficient animal or human evidence.

Proposition 65 Section 24249.8(a) spells out OEHHA's Labor Code listing authority:

On or before March 1, 1987, the Governor shall cause to be published a list of those chemicals known to the state to cause cancer or reproductive toxicity within the meaning of this chapter, and he shall cause such list to be revised and republished in light of additional knowledge at least once per year thereafter. Such list shall include at a minimum those substances identified by reference in Labor Code Section 6382(b)(1) and those substances identified additionally by reference in Labor Code Section 6382(d).

B. OEHHA Does Not Give the Public a Reason for Proposed Subsection (a)(1).

OEHHA claims in its Statement of Reasons that “[t]o identify chemicals that must be listed via this mechanism, OEHHA must look to the named sources identified in the specific subsections of the Labor Code that are incorporated into Proposition 65.” Statement of Reasons at 2 (emphasis added). Spotting so-called “named sources” is not a substitute for reasoned statutory interpretation. In its “Summary and Rationale of Regulation,” OEHHA does not explain why or how the Director’s List could be interpreted as a “named source” in Labor Code Section 6382(d) (see p. 5). OEHHA hides in footnote 10 a quotation of Section 6382(d), and the only clue to its rationale is its emphasis in italics of the following phrase: *“in addition to those substances on the director’s list of hazardous substances.”*

OEHHA could have supported this supposed rationale better if it had quoted and emphasized only the words *“those substances on the director’s list of hazardous substances,”* rather than *“in addition to”* and rather than quoting the remaining language. *“In addition to”* and the remaining language undermine OEHHA’s interpretation because the only possible basis upon which OEHHA could claim authority to list substances from the Director’s List would be to ignore every word in Section 6382(d) except *“those substances on the director’s list.”* OEHHA does not give supporting reasons or explanation for proposed Subsection (a)(1) because there is none.

When analyzing OEHHA’s listing activities over the years, the California Courts of Appeal have applied “[the] ‘cardinal rule of [statutory] construction that words and phrases are not to be viewed in isolation; instead, each is to be read in the context of the other provisions . . . bearing on the same subject Strained interpretation, or construction leading to unreasonable or impractical results, is to be avoided.’” AFL-CIO v. Deukmejian, 212 Cal. App. 3d 425, 439 (1989) (quoting Fields v. EU, 18 Cal. 3d 322, 328 (1978)).

The courts also have held that “[i]n ascertaining the meaning of a statute, we look first to the language in which it is framed. . . . If the language is clear, the statute must be enforced according to its terms.” Id. at 433 (citing Leroy T. v. Workmen’s Comp. Appeals Bd., 12 Cal. 3d 434, 438 (1974)). See also California Chamber of Comm. v. Brown, 196 Cal. App. 4th 233, 263 (2011) (a court need not look outside of a statute if the language is clear and unambiguous); SIRC v. OEHHA, 210 Cal. App. 4th 1082, 1098 (2012).

To understand why the Director’s List could not possibly be interpreted as a so-called “named source” in Labor Code Section 6382(d), it is necessary simply to read each provision of Section 6382. The language is clear, and it does not name the Director’s List as a source; rather, it names the federal Hazard Communication Standard (HCS). Even when read on its own, Section 6382(d) clearly does not refer to the Director’s List as a source of hazardous substances. In fact, the “named sources” in Labor Code Section 6382, two of which OEHHA is authorized to list from under Proposition 65, are sources which the DIR consults for creation of its list of hazardous

substances for communication in the workplace. The Director's List, therefore, is not intended to be a "named source" in Section 6382(d), and it does not make any sense to interpret it as such. It is unreasonable for OEHHA to force the public to expend its resources to object to its new and strained interpretation of Labor Code Section 6382(d).

The California Courts of Appeal have repeatedly held that OEHHA's interpretation of the Labor Code Listing Mechanism is entitled to little or no deference. *Id.* at 1099; *Brown*, 196 Cal. App. 4th at 254. This is because OEHHA has vacillated so much over the years with various interpretations of its listing authority. *Id.* at 1099-00; 254-55. OEHHA's current interpretation is therefore irrelevant, particularly when it is only based on several italicized words in a footnote. Only the clear and unambiguous language of Proposition 65 and Labor Code Section 6382(d) are relevant here. This language is addressed next.

C. Proposed Subsection (a)(1) is Invalid under the Relevant Statutory Language.

Proposition 65 allows OEHHA to list substances identified by reference in Labor Code Sections 6382(b)(1) and (d). One can readily understand which substances are identified by reference in Subsections (b)(1) and (d) by reading Section 6382 as a whole.

Labor Code Section 6382 contains the process for the creation of a list of hazardous substances for communication in the workplace. It provides:

The director shall prepare and amend the list of hazardous substances according to the following procedure:

(a) Any substance designated in any of the following listings in subdivision (b) shall be presumed by the director to be potentially hazardous and shall be included on the list; provided, that the director shall not list a substance or form of the substance from the listings in subdivision (b) if he or she finds, upon a showing pursuant to the procedures set forth in Section 6380, that the substance as present occupationally is not potentially hazardous to human health; and provided further, that a substance, mixture, or product shall not be considered hazardous to the extent that the hazardous substance present is in a physical state, volume, or concentration for which there is no valid and substantial evidence that any adverse acute or chronic risk to human health may occur from exposure.

- (b) The listings referred to in subdivision (a) are as follows:
- (1) Substances listed as human or animal carcinogens by the International Agency for Research on Cancer (IARC).
 - (2) Those substances designated by the Environmental Protection Agency pursuant to Section 307 (33 U.S.C. Sec. 1317) and Section 311 (33 U.S.C. Sec. 1321) of the federal Clean Water Act of 1977 (33 U.S.C. Sec. 1251 et seq.) or as hazardous air pollutants pursuant to Section 112 of the federal Clean Air Act, as amended (42 U.S.C. Sec. 7412) which have known, adverse human health risks.
 - (3) Substances listed by the Occupational Safety and Health Standards Board as an airborne chemical contaminant pursuant to Section 142.3.
 - (4) Those substances designated by the Director of Food and Agriculture as restricted materials pursuant to Section 14004.5 of the Food and Agricultural Code which have known, adverse human health risks.
 - (5) Substances for which an information alert has been issued by the repository of current data established pursuant to Section 147.2.

The Director's List, therefore, is built by listing substances which are identified by the named sources in Subsection (b). Of those named sources, Proposition 65 allows OEHHA to list substances identified by reference to the source in Subsection (b)(1), which is the IARC. Next, Subsection (c) provides:

- (c) The director shall at least every two years review the listings in subdivision (b) and shall revise the list to include new substances so listed or exclude substances no longer on the listings, pursuant to the standards set forth in subdivision (a).

Next, Subsection (d) provides:

- (d) Notwithstanding Section 6381, in addition to those substances on the director's list of hazardous substances, any substance within the scope of the federal Hazard Communication Standard (29 C.F.R. Sec. 1910.1200) is a hazardous substance subject to this chapter.

Labor Code Section 6381 provides:

Substances not present on the list of hazardous substances adopted pursuant to Section 6380 [which requires the director to establish a list pursuant to Section 6382] shall not be subject to the provisions of this chapter.

To understand how Section 6382(d) could not be referring to the Director's List as a "named source," it is important to consider that Subsections (a) and (b) address the "named sources" for substances which are identified for placement on the Director's List. In addition, because Subsection (c) addresses revisions to the Director's list, it is clear that the composition of the Director's List has already been addressed once Subsection (c) applies.

One must consider next that because Section 6381 provides that substances which are not on the Director's List are not subject to the chapter, the first part of 6382(d), which states "Notwithstanding Section 6381," must mean that the subsequent part will address substances which are not on the Director's List but which will be subject to the chapter. Moreover, because Subsection (b) already named the sources for the substances on the Director's List, the subsequent part of 6382(d) will not refer to sources for substances on the Director's List. Therefore, when 6382(d) states "in addition to those substances on the director's list of hazardous substances, any substance within the scope of the federal Hazard Communication Standard (29 C.F.R. Sec. 1910.1200) is a hazardous substance subject to this chapter," the subject of the phrase could only be substances which are identified in the federal Hazard Communication Standard and not substances which are on the Director's List.

OEHHA has fabricated a linguistic construct that the Director's List should be considered a "named source" of chemicals for listing under Proposition 65 because the words "director's list" appear in Section 6382(d). The words "director's list" appear in Section 6382(d), but only to say that in addition to sources used to build the director's list, the HCS also is a source for Proposition 65 listing. The subject of Section 6382(d) is the HCS. When Proposition 65 provides that OEHHA can list "substances identified by reference in Labor Code Section 6382(d)," the only substances it could be referring to are those which are identified by the HCS. Proposed Subsection (a)(1) therefore is invalid because it would allow OEHHA to list substances which are not identified by reference in Labor Code Section 6382(d).

D. Proposed Subsection (a)(1) is Invalid Under the Case Law.

The courts have construed OEHHA's listing authority under the Labor Code Listing Mechanism, and they have never held that it can list substances under Proposition 65 from the Director's List. Three years after Proposition 65 was enacted, the court in Deukmejian, 212 Cal. App. 3d 425, addressed the issue of whether the Proposition 65 list must include animal carcinogens which are identified by reference to the Labor Code. The court explained the Proposition 65 Labor Code Listing Mechanism throughout its decision:

Subdivision (a) of section 25249.8 specifies that the initial list include “at a minimum” those chemicals identified by reference in Labor Code section 6382, subdivisions (b)(1) and (d). Labor Code section 6382 is a part of the California Occupational Safety and Health Act of 1973. (Lab.Code, §§ 6300, et seq.) It requires the Director of Industrial Relations to prepare and maintain a list of substances potentially hazardous to human health and specifies various categories of substances for inclusion therein.

Labor Code section 6382 refers in subdivision (b)(1) to ‘substances listed as human or animal carcinogens by the International Agency for Research on Cancer (IARC). . . .’

Labor Code section 6382, subdivision (d), refers to ‘. . . any substance within the scope of the federal Hazard Communication Standard (HCS) (29 C.F.R. Sec. 1910.1200). . . .’ [Omission is the court’s] . . .

[T]he HCS defines as a ‘carcinogen’ all substances listed by IARC in categories 1 and 2 as well as substances identified and listed by NTP as known or probable human carcinogens (on the basis of known carcinogenicity in animals) and certain additional substances listed by OSHA. (29 C.F.R., § 1900.1200, append. A.) Thus, all known or probable human carcinogens identified by IARC and NTP are presumed conclusively by HCS to be carcinogens and must be included on the initial list pursuant to section 25249.8, subdivision (a) and Labor Code section 6382, subdivision (d).

Id. at 433-35, 437.

The Deukmejian Court interpreted the two “named sources” identified in Labor Code Sections 6382(b)(1) and (d) as the IARC and the HCS. It did not mention the Director’s List as a source which is referred to in Section 6382(d), and it left out the phrase “in addition to those substances on the director’s list of hazardous substances” in the quoted language. The court also found that the initial Proposition 65 list, which was created by reference to Labor Code Sections (b)(1) and (d), contained substances from the IARC’s list, the NTP’s list and OSHA’s list. Id. at 430. The court does not mention the Director’s List. See id.

In Brown, 196 Cal. App. 4th at 241, the Court of Appeal also did not interpret the Director’s List to be an authorized Proposition 65 listing source. It held:

Labor Code section 6382, subdivision (b)(1), expressly referenced in Proposition 65's Labor Code reference method (Health & Saf. Code, § 25249.8, subd. (a)), identifies "[s]ubstances listed as human or animal carcinogens by the International Agency for Research on Cancer (IARC)." (Lab. Code, § 6382, subd. (b)(1).)

Subdivision (d) of Labor Code section 6382, also expressly referenced in Proposition 65's Labor Code reference method (Health & Saf. Code, § 25249.8, subd. (a)) states "in addition to those substances on the director's list of hazardous substances, any substance within the scope of the federal Hazard Communication Standard (29 CFR Sec. 1910.1200) is a hazardous substance subject to this chapter." (Lab. Code, § 6382, subd. (d).)

Thus, Proposition 65's Labor Code reference method embraces "[s]ubstances listed as human or animal carcinogens by the [IARC]" (Lab. Code, § 6382, subd. (b)(1)) and "any substance within the scope of the federal Hazard Communication Standard (29 C.F.R. Sec. 1910.1200)" (Lab. Code, § 6382, subd. (d)).

Throughout its decision, this court explained that the IARC and the HCS are the two referenced sources under the Labor Code Listing Mechanism. This court did not hold that the Director's List is a listing source.

Likewise, in SIRC v. OEHHA, 210 Cal. App. 4th at 1089-90, the court found that the HCS was the only named authorized source in Labor Code Section 6382(d):

Section 25249.8, subdivision (a), requires the publication of a list of chemicals "known to the state to cause cancer or reproductive toxicity within the meaning of this chapter." (§ 25249.8, subd. (a).) It then goes on to mandate that the list include, at a minimum, substances identified by reference in Labor Code section 6382, subdivision (d), which in turn identifies substances within the HCS.

The SIRC v. OEHHA Court also did not hold that the Director's List is an authorized listing source. See id.

The case law is clear: the Director's List has never been a listing source for Proposition 65. An administrative agency is precluded from offering a new interpretation of its authority that rejects the interpretation which has been definitely adopted by a court as its own. Henning v. Industrial Welfare Comm'n, 46 Cal. 3d 1262, 1270 (1988) (noting also that an administrative agency cannot "change its mind" with a new construction). The California courts have decided the issue of OEHHA's listing authority under the Labor Code Listing Mechanism. OEHHA cannot

adopt a new interpretation of its listing authority. Proposed Subsection (a)(1) is therefore invalid.

E. Proposed Subsection (a)(1) Violates the APA Because it Expands the Scope of OEHHA's Labor Code Listing Authority.

Proposition 65 does not allow OEHHA to list from the Director's List, and OEHHA cannot give itself the authority to do so. This regulation expands the scope of OEHHA's authority considerably. It not only allows OEHHA to list from the Director's List, but it effectively allows OEHHA to list from each of the sources named in Section 6382(b) rather than only 6382(b)(1) and (d) as Proposition 65 provides.

The California Court of Appeal, again when addressing OEHHA's actions under the Labor Code Listing Mechanism, recently restated the fundamental rule that an agency is never permitted to enlarge the scope of its authority by altering or amending a statute or enlarging or impairing its scope. SIRC v. OEHHA, 210 Cal. App. 4th at 1099-100. See also APA § 11342.1, .2.

In City of Arlington v. FCC, 569 U.S. ____ (2013), the United States Supreme Court held that the only relevant question when confronted with an agency's interpretation of a statute "is always, simply, *whether the agency has stayed within the bounds of its statutory authority.*" Slip op. at 5. The Court explained that "[w]here Congress has established a clear line, the agency cannot go beyond it." Id. at 16.

Each Court of Appeal which has addressed the Labor Code Listing Mechanism found that the California Legislature has established a clear line: OEHHA can list substances identified by the IARC when it refers to Labor Code Section 6382(b)(1), and it can list substances identified within the HCS when it refers to Labor Code Section 6382(d). OEHHA is not permitted to go beyond this clear line in its proposed Subsection (a)(1).

F. Proposed Subsection (a)(1) Is Invalid Because OEHHA Cannot Adopt a new Interpretation of its Labor Code Listing Authority.

OEHHA's history of regulatory proposals shows that the current proposal is beyond its authority under Proposition 65. OEHHA proposed a similar Labor Code listing regulation in 2008 which provided that it could list substances identified by the IARC and within the HCS.

OEHHA did not propose to list from the Director's List in 2008. The slides OEHHA showed the public at the workshop for the 2008 proposed regulation explained the meaning of Labor Code Section 6382(d): "Section 6382(d) . . . any substance within the scope of the federal Hazard Communication Standard (29 C.F.R. Sec. 1910.1200). . . ." Pre-Regulatory Workshop Outline, June 17, 2008. Just as the courts have done, OEHHA omitted the phrase "in addition to those substances on the Director's List." OEHHA indicated in 2008 that this phrase was not relevant to its listing authority. Section 25249.8(a) of Proposition 65 gives OEHHA its Labor Code listing

authority. This relevant statutory language has not changed, and so OEHHA's authority is the same now as it was in 2008.

OEHHA attempted in 2009 to list styrene and vinyl acetate under Proposition 65 even though these chemicals were not known to cause cancer. It attempted to do so based on a new interpretation of its listing authority. The Court of Appeal therefore had to remind OEHHA that it cannot expand the scope of its Labor Code listing authority by reinterpreting its authority. The Court said that OEHHA's interpretation was entitled to little or no weight because of its vacillating practice of asserting a new interpretation which contradicts a prior interpretation. SIRC v. OEHHA, 210 Cal. App. 4th at 1099.

This is especially true with respect to this proposed regulation. OEHHA's new interpretation of its listing authority 27 years after Proposition 65 was enacted is entitled to no deference because it contradicts an established interpretation by the courts. OEHHA impermissibly attempts to do what the courts have already done. The SIRC v. OEHHA court said that "[u]ltimately, any question regarding the proper interpretation of a statute is an exercise of judicial power for the courts." Id. at 1100.

In Ontario Community Foundation v. State Bd. of Equalization, 35 Cal. 3d 811 (1984), the California Supreme Court declared invalid a business sales tax regulation which restricted the availability of a statutory tax exemption. The court made note of the fact that the State Board of Equalization had adopted the regulation in question almost 30 years after enactment of the governing statute. In striking down the regulation, the Court said: "[m]ost important, the regulatory restriction imposes upon the availability of a statutory tax exemption conditions which not only are omitted from, but also are at variance, with the statute. Such a regulation must be deemed to 'alter or amend the statute' and 'impair its scope,' and is void." Id. at 817 (quoting Woods v. Superior Court, 28 Cal. 3d 668, 679 (1981)). Moreover, the court emphasized the principle that "[w]hatever the force of administrative construction . . . final responsibility for the interpretation of the law rests with the courts." Id. at 816 (quoting Morris v. Williams, 67 Cal. 2d 733, 748 (1967)).

This proposed regulation is another attempt by OEHHA to list substances which it is not authorized to list by altering the scope of Proposition 65 and by ignoring established judicial interpretation of its Labor Code Listing Authority.

G. The Only Reasonable Alternative is to Withdraw this Proposed Regulation.

OEHHA is required to consider reasonable alternatives which are less burdensome and equally effective. APA § 11346.2(b)(4)(A). OEHHA states that it rejected the alternative of doing nothing because "businesses should have the opportunity to know and understand the process by which OEHHA currently adds chemicals and substances to the Proposition 65 list via the Labor Code mechanism." Statement of Reasons at 3-4. OEHHA does not "currently" add

chemicals and substances to the Proposition 65 list using the Director's List. The Statement of Reasons is misleading.

When OEHHA tells the public that the "the proposed regulation does not impose any new requirement upon any business," and that "the proposed regulatory action will not have a significant statewide adverse economic impact directly affecting businesses," it also misleads the public into believing that this proposed regulation is consistent with OEHHA's past practices and cost neutral. It is neither. Any regulation which impermissibly allows an agency to assert its authority over members of the public who are not subject to its authority necessarily imposes "new requirements" and potentially could have "adverse economic impacts," especially with respect to Proposition 65 and the significant irreparable effect of its warning requirements. The only reasonable alternative to an unlawful regulation is to withdraw it. See APA § 11342.1, et seq.

V. PROPOSED SUBSECTION (a)(2) IS INVALID BECAUSE OEHHA IS AUTHORIZED TO LIST SOLELY FROM OSHA'S "FLOOR LIST" BY REFERENCE TO LABOR CODE § 6382(d).

A. Proposed Subsection (a)(2) is Invalid Because it is Ambiguous.

Regulations must be "written or displayed so that the meaning of the regulations will be easily understood by those persons directly affected by them." APA §§ 11349(c), 11349.1(a)(3). Proposed Subsection (a)(2) does not clearly and unambiguously reflect OEHHA's listing authority by reference to Labor Code Section 6382(d). It must be reworded so that it tells the public that OEHHA can list only those substances within the federal Hazard Communication Standard (HCS) that the Occupational Safety and Health Administration (OSHA) requires to be classified as carcinogens (see analysis in § VI below).

Because proposed Subsection (a)(2) refers to chemicals "identified as causing cancer" by reference in the HCS, it appears to be within the bounds of OEHHA's statutory authority, but it is written too ambiguously to be valid. OEHHA's 2008 proposed regulation provided that it could list chemicals "if they are regulated by OSHA as carcinogens." "Pre-Regulatory Workshop Slides," June 17, 2008. If proposed Subsection (a)(2) addresses only the carcinogens regulated by OSHA, then it must clearly reflect this, but it does not for the following reasons and therefore is potentially invalid.

First, OEHHA includes "1200" in its citation to the relevant HCS provision, but 1200 is for "Hazard Communication" generally and contains OSHA's criteria for classifying chemicals. It is not the relevant part of the standard which addresses the carcinogens OSHA specifically regulates. That standard is properly referenced at 29 C.F.R. part 1910, subpart Z. Proposed Subsection (a)(2) must include this citation. See "How to Participate in the Rulemaking Process," at 21 (located on OEHHA's website) (Office of Administrative Law may presume a regulation is unclear if it does not use correct citations).

Second, in the Statement of Reasons, OEHHA quotes at length the HCS criteria for classifying chemicals and concludes that “when a chemical is classified by a manufacturer or employer as a carcinogen or a developmental or reproductive toxin pursuant to the above mandatory criteria, the chemical is, by definition, within the scope of the Hazard Communication Standard and will be listed under Proposition 65.” Statement of Reasons at 5-9. OEHHA appears to be proposing that it may list chemicals under Proposition 65 pursuant to optional HCS criteria within Appendix A of the HCS in lieu of listing chemicals from OSHA’s presumed carcinogen list. OEHHA also appears to propose that notations on safety data sheets will form the basis for Proposition 65 listings for the first time in 27 years, but it does not tell the public if it plans to list chemicals in this fashion.

Proposed Subsection (a)(2) is invalid if OEHHA is proposing to rely on the HCS criteria rather than the HCS mandated list of carcinogens. It is also invalid if OEHHA plans to require businesses to place cancer warnings on their products by reference to safety data sheet notations, which, according to OSHA, is “useful information” – not a chemical classification. 77 Fed. Reg. 17,574, 17, 581 (March 26, 2012) (Final Rule Summary). The only permissible basis on which OEHHA may list from the HCS is by reference to the HCS mandatory carcinogen list, as the analysis below in Section VI will show.

Third, it appears OEHHA may indeed be proposing to list chemicals under Proposition 65 based on the HCS classification criteria because it claims that “within the scope of the federal Hazard Communication Standard” means that “OEHHA cannot simply refer to a list of chemicals with corresponding endpoints.” Statement of Reasons at 5. As the analysis in Section VI below shows, however, OEHHA must refer to a list of chemicals in the HCS. The courts have told OEHHA since 1989 exactly what the phrase “within the scope of the federal Hazard Communication Standard” means: it meant the “floor lists” located within the HCS. E.g., Brown, 196 Cal. App. 4th at 264.

The HCS now contains one floor list of carcinogens (see § VI below). OSHA summarized the 2012 HCS and explained that it deletes from the hazard classification requirements the “ ‘floor’ of hazardous chemicals . . . established lists of chemicals that are considered hazardous under the HCS in all situations.” 77 Fed. Reg. at 17,798 . OSHA, however, retained its own “floor” list of the OSHA-regulated carcinogens. Id.

This list is located in 29 C.F.R. part 1910 (not “1200” and not safety data sheet notations), subpart Z. The 2012 HCS states: “Where OSHA has included cancer as a health hazard to be considered by classifiers for a chemical covered by 29 C.F.R. part 1910, subpart Z, Toxic and Hazardous Substances, chemical manufacturers, importers, and employers shall classify the chemical as a carcinogen.” 29 C.F.R. 1910.1200, App. A § A.6.4.2. Proposed Subsection (a)(2) is invalid if it does not clearly relate only to the OSHA-regulated carcinogens.

Fourth, proposed Subsection (a)(2) provides that OEHHA will list a chemical if it is identified as causing reproductive or developmental toxicity in the HCS. Because OEHHA can only list from the OSHA-regulated carcinogens list, reproductive toxin listings by reference to the HCS are outside of its scope of authority. Proposed Subsection (a)(2) is invalid if OEHHA does not delete the reference to reproductive or developmental toxins.

B. Proposed Subsection (a)(2) is Invalid Because it is Unnecessary.

An agency cannot adopt a rule unless there is substantial evidence that it is necessary to effectuate the purpose of a statute, court decision or other provision of law. APA §§ 11349(1), 11389.1. The analysis in Section VI below regarding proposed Subsection (a)(3) shows that since 1989 the courts have clearly and unambiguously spelled out OEHHA's Labor Code listing authority when it refers to the HCS: it is only permitted to list a chemical under Proposition 65 if OSHA has mandated that the chemical be identified under the HCS as a carcinogen. E.g., SIRC v. OEHHA, 210 Cal. App. 4th 1082.

The public may read SIRC v. OEHHA or one of the other Court of Appeal decisions if it wants to know how OEHHA lists chemicals by reference to the Labor Code. There is no need now for proposed Subsection (a)(2) which, even if clearly and accurately written, would state what the public already knows, which is that OEHHA can list from the OSHA-regulated carcinogens in 29 C.F.R. Part 1910, subpart Z.

The APA precludes agencies from spending time and public funds adopting unnecessary regulations. APA § 11340 ("Legislative Intent"). In the Statement of Reasons addressing "Necessity," OEHHA states:

Although the process for listing chemicals under Proposition 65 is expressly excluded from the Administrative Procedure Act . . . the purpose of the proposed regulation is to clarify and explain to the public the way OEHHA identifies chemicals that must be added to the Proposition 65 list.

Again, OEHHA is subject to the APA. In fact, in the past OEHHA has withdrawn proposed regulations because the existing body of statutory and case law rendered them unnecessary. E.g., OEHHA, Final Statement of Reasons, Repeal of Regulation 12901 (2005), pp. 1-3. OEHHA should do the same with this proposed regulation.

VI. PROPOSED SUBSECTION (a)(3) IS INVALID BECAUSE OEHHA IS NOT AUTHORIZED TO LIST SUBSTANCES FROM THE NTP'S REPORT ON CARCINOGENS WHEN LISTING BY REFERENCE TO THE HCS.

A. Proposed Subsection (a)(3) is Invalid under the OSHA Amendments.

OEHHA states the following in support of proposed Subsection (a)(3):

Subsection (a)(3) of the proposed regulation explains how OEHHA identifies chemicals or substances that have been evaluated by the National Toxicology Program (NTP) and listed in its Report on Carcinogens as carcinogens. These chemicals are included on the Proposition 65 list based upon mandatory Appendix A to Title 29 Code of Federal Regulation 1910.1200 quoted above, which *allows* a manufacturer or employer to rely on the NTP designations for purposes of classifying chemicals, and to Appendix D of Regulation 1910.1200, based on the requirement for safety data sheets to disclose NTP's carcinogen identifications on safety data sheets.

Statement of Reasons at 9 (emphasis added).

In its Statement of Reasons, OEHHA does not justify why it proposes to ignore the clear language of Proposition 65 and the established case law to use its discretion under the HCS optional classification criteria or the safety data sheet information to list chemicals under Proposition 65 rather than to stay within the bounds of its statutory authority and list only from OSHA's mandatory list of carcinogens.

OEHHA has known at least since 1989 that it is permitted to list only those substances from the HCS which OSHA deems to be carcinogens. OEHHA also has known that it has never had the authority to list under Proposition 65 based on safety data sheet information. "Within the scope of the federal Hazard Communication Standard" is well defined. OEHHA cannot redefine it. Subsection (a)(3) is therefore invalid.

The 2012 HCS amendment which is relevant to OEHHA's authority to list by reference to the HCS is OSHA's deletion of Subsections (d)(3) and (d)(4) in 29 C.F.R. § 1910.1200. These subsections contained the "floor lists" of presumptively hazardous chemicals which all classifiers had to follow. See OSHA, "Side-by-Side Comparison" of the 1994 HCS with the 2012 HCS, www.osha.gov/dsg/hazcom/side-by-side.html. This amendment has left OEHHA with fewer choices under the HCS for Proposition 65 listings, although OSHA retained one of the traditional floor lists.

The HCS now provides in Appendix A that chemical classifiers are to evaluate their own chemicals by following the HCS criteria for the classification of cancer and health hazards based on a weight of evidence evaluation. 29 C.F.R. 1910.1200, Appendix A. Appendix A provides that classifiers may choose to follow NTP's Report on Carcinogens (RoC) or the IARC's Monographs in lieu of applying the HCS criteria themselves, but they are not required to do so. Id. at § A.6.4.1. OSHA continues to require, however, that all classifiers identify as carcinogens the substances it regulates in 29 C.F.R. part 1910, subpart Z. Id. at § A.6.4.2.

OSHA retained from the old standard the safety data sheet rule that provides for a notation on the safety data sheets of the NTP's and the IARC's carcinogen classifications. 77 Fed. Reg. at 17,581. As stated above, OSHA considers these notations to be for information purposes only. See id. OSHA revised its Non-Mandatory Appendix F which, much like the Appendix A, includes the IARC's and NTP's classifications as optional sources for guidance in classifying chemicals. Id.

Because the provision in Proposition 65 that gives OEHHA its Labor Code listing authority is the same as it was in 1986, and because the relevant statutory language in Labor Code Section 6382(d) is same as it was in 1986, OEHHA's authority to list from the HCS by reference to Section 6382(d) has not changed. The courts have said, as elaborated upon below, that Labor Code Section 6382(d)'s reference to "within the scope of the federal Hazard Communication Standard" means that OEHHA can list from the floor lists contained in the HCS. Because OEHHA does not derive its authority from the HCS, the HCS 2012 amendments do not alter the way OEHHA may list chemicals under Proposition 65 when it refers to the HCS.

B. Proposed Subsection (a)(3) is Invalid Because OEHHA Does Not Have the Statutory Authority to List from the NTP's Listings by Reference to the HCS.

The Court of Appeal in Deukmejian, 212 Cal. App. 3d at 435-38, addressed the Labor Code Listing Mechanism and explained what the Proposition 65 Labor Code Listing Mechanism's reference to Labor Code Section 6382(d) means. The Court examined the language in Proposition 65 and the intent expressed in Proposition 65's ballot initiative and found that listing by reference to the HCS means that the Proposition 65 list was meant to include substances which "are presumed conclusively by the HCS to be carcinogens." Id. at 437. The court went on to explain "the HCS defines as 'carcinogens' all substances listed by IARC in categories 1 and 2 as well as substances identified and listed by NTP as known or probable human carcinogens . . . and certain other substances listed by OSHA." Id.

The Court of Appeal in Brown, 196 Cal. App. 4th at 261, agreed with this interpretation. It stated that although "Labor Code Section 6382, subdivision (d), does not expressly refer to any listing source, . . . [this section's] explicit reference to 'substances within the scope of the federal [HCS]' . . . provides a clear roadmap to the listing sources it embraces." It went on to explain that those sources were located in subparts (d)(3) and (d)(4) of the HCS, which were the provisions containing the "floor lists." Id. The court concluded: "In light of the established

regulatory history, the reference in section 25249.8, subdivision (a), to Labor Code section 6382, subdivision (d), which, in turn, refers to any substance ‘within the scope of the federal [HCS]’ (Lab.Code, § 6382, subd. (d)), reflects an intent to encompass the ‘floor lists’” Id. at 264. The sources listed in section (d)(4) were the NTP’s ROC, the IARC Monograph and 29 C.F.R. part 1910, subpart Z . Id. at 261-62.

Likewise, the Court of Appeal in SIRC v. OEHHA, 210 Cal. App. 4th at 1089-90, while addressing OEHHA’s 2009 attempt to list styrene and vinyl acetate under Proposition 65, also interpreted the Labor Code’s reference to the HCS and confirmed that it was meant to encompass the floor lists: “The HCS ‘was created in 1983’ [t]wo provisions of the HCS require a manufacturer, importer or employer to treat a chemical as a hazardous substance if it is identified as such by certain sources One such provision is relevant to the present matter. Subpart (d)(4) identifies the following sources as establishing that a chemical is ‘a carcinogen or potential carcinogen for hazard communication purposes: (i) National Toxicology Program (NTP), Annual Report on Carcinogens (latest edition); (ii) International Agency for Research on Cancer (IARC) Monographs (latest editions); or (iii) 29 C.F.R. part 1910, subpart Z, Toxic and Hazardous Substances, Occupational Safety and Health Administration. (Quoting 29 C.F.R. § 1910.1200(d)(4)) (emphasis omitted).

These courts have adopted an interpretation of OEHHA’s Labor Code listing authority which has become established over the years. Although OSHA amended the HCS in 2012, the amendments are not relevant to OEHHA’s listing authority. It may continue to list from the HCS “floor list.” OEHHA is bound by the case law and is precluded from expanding its listing authority simply because OSHA deleted two of the traditional floor lists.

In Brown, 196 Cal. App. 4th at 258, the court noted that although the specific language in Labor Code Section 6382((b)(1) or (d) has not changed since Proposition 65 was enacted, the lists of hazardous substances which are located within the HCS have changed throughout the years. The court stated that “section 25249.8, subdivision (a), “anticipates change.” Id. The court did not go on to say, however, that OEHHA’s authority changes accordingly. See also, SIRC v. OEHHA at 1097. The court therefore implicitly recognized that although change occurs within the HCS over the years, OEHHA’s authority remains the same.

OEHHA now has fewer listing choices under the 2012 HCS. Proposed Subsection (a)(3) is invalid because OEHHA has reinterpreted and expanded its listing authority in reaction to the 2012 HCS amendments.

C. Proposed Subsection (a)(3) is Invalid Because it Contradicts OEHHA's Established Interpretation.

When OEHHA in the past has attempted to list substances by reference to the HCS, it has always listed by reference to the HCS's floor lists. OEHHA's past Notices of Intent to List under the Labor Code Listing Mechanism reflect its established interpretation. Its 2009 NOIL, for example, states:

The law requires that certain substances identified by the International Agency for Research on Cancer (IARC) or the National Toxicology Program (NTP) be listed as known to cause cancer under Proposition 65. Labor Code § 6382(b)(1) refers to substances identified as human or animal carcinogens by the IARC. Labor Code § 6382(d) refers to substances identified as carcinogens or potential carcinogens by the IARC or the NTP. The IARC concluded that styrene is "possibly carcinogenic to humans" (Group 2B). Therefore, this substance meets the requirements of Labor Code § 6382(d).

(Emphasis added).

OEHHA's 2013 NOIL regarding styrene, however, reflects OEHHA's attempt to reinterpret its authority to accommodate the HCS amendments:

Labor Code § 6382(d) incorporates chemicals and substances within the scope of the Federal Hazard Communications Standards. Title 29, Code of Federal Regulations § 1910.1200. The federal regulations, in turn, identify the National Toxicology Program (NTP) as a source for identifying chemicals that cause cancer. Mandatory Appendix A, 29 CFR 1910.1200. The NTP listing criteria and the process for report preparation and scientific peer review are described in the Report on Carcinogens. . . . Styrene meets the requirements for listing as known to the state to cause cancer for purposes of Proposition 65.

(Emphasis added).

OEHHA did not state in the new NOIL that the law requires substances listed by the NTP to be listed under Proposition 65, as it did in 2009. OEHHA misled the public by using the words "identify" and "mandatory" because styrene is not a required carcinogen identification in the HCS and because the NTP's list is not a mandatory classification in the HCS, even though there is an option to follow it in Appendix A. A careful reading of this NOIL shows that OEHHA implies it

can now list by reference to the HCS optional criteria rather than by reference to the HCS floor lists.

Even after the HCS amendments, OEHHA has continued to mislead and confuse the public. OEHHA's Chief Counsel recently stated in a Carcinogenic Identification Committee (CIC) meeting that if OSHA "requires" manufacturers to label a product to say it causes cancer, then OEHHA will list it. January 25, 2013 CIC Meeting Transcript at 21. Use of the word "requires" leads the public to believe that OEHHA has not reinterpreted its authority and will continue to list only from the OSHA required floor list.

Without directly telling the public, however, that OEHHA had in fact decided after 27 years to list chemicals according to safety data sheet information in lieu of mandatory classifications, the Chief Counsel said at the same CIC meeting that if OSHA "requires a chemical manufacturer . . . to provide an MSDS for their product that says it causes cancer, then we need to list those chemicals under Prop 65." Id.

In February 2013, OEHHA updated "Proposition 65 in Plain Language," which can be found on its website. It described the listing mechanisms and stated the following: "a fourth way requires the listing of chemicals meeting certain scientific criteria and identified in the California Labor Code as causing cancer or birth defects or other reproductive harm." Again, OEHHA misled the public with language from its old NOILs while asserting its new interpretation.

The California Supreme Court has invalidated regulations which " 'flatly contradict the position which the agency had enunciated at an earlier date, closer to enactment of the [governing] statute.' " Henning, 46 Cal. 3d at 1278 (quoting General Electric v. Gilbert, 429 U.S. 125, 142 (1976)).

OEHHA's re-interpretation of its listing authority within proposed Subsection (a)(3) is not entitled to any deference because the public has relied for years on the interpretation established by OEHHA and the courts. Proposed Subsection (a)(3) is therefore invalid.

D. Proposed Subsection (a)(3) is Invalid Because it Conflicts with Proposition 65.

1. Proposed Subsection (a)(3) Conflicts with Proposition 65's Listing Scheme.

OEHHA has maintained for years, and the courts for the most part have agreed, that the Labor Code Listing Mechanism provided for in Proposition 65 Section 25249.8(a) is an "essentially automatic" method to list chemicals on the Proposition 65 list. E.g., SIRC v. OEHHA, 210 Cal. App. 4th at 1100. The courts have said that the legislature intended that OEHHA refer to "lists" of substances identified by reference to Labor Code Sections 6382(b)(1) and 6382(d)(2). E.g., Deukmejian, 212 Cal. App. 3d at 436. In contrast to the Labor Code Listing Mechanism, Proposition 65's listing mechanisms provided for in Section 25249.8(b) incorporate discretion

and independent judgment on the part of OEHHA and its Science Advisory Board and consideration of the underlying science.

Even though this proposed regulation would permit OEHHA to list chemicals using discretion and independent judgment, contrary to the clear language of Proposition 65 and the original intent, OEHHA insists that “[this] listing procedure is ministerial and therefore essentially automatic.” Statement of Reasons at 13. OEHHA’s insistence reflects an attempt to convince the public that its new interpretation is consistent with the original Proposition 65 listing scheme when in fact it disrupts the original scheme

Listing from the NTP’s RoC by reference to the 2012 HCS would require OEHHA to use its independent judgment and discretion by choosing an optional method to classify chemicals rather than simply referring to a mandated classification. Proposition 65, however, does not give OEHHA the power to make a choice when it refers to the HCS. The fact that chemical manufacturers and importers have the option to follow the NTP’s listings does not mean OEHHA may also begin exercising its own judgment and discretion to list. OEHHA’s authority is derived only from Section 25249.8(a) of Proposition 65, and it does not allow OEHHA to make choices when subjecting the California public to Proposition 65 regulation. Moreover, the HCS is designed to allow only chemical manufacturers and importers to make a choice about their own products for federal regulatory compliance. A governmental agency which is authorized to refer to the HCS for an entirely different purpose, and whose reference to the HCS affects millions of individuals and businesses, has no right to make an unauthorized judgment under the HCS. How private entities choose to classify their own chemicals is vastly different from how OEHHA lists chemicals under Proposition 65 on behalf of the State of California.

It would be unlawful and a gross violation of due process for OEHHA to list chemicals based on the “short cut” provided for in the HCS pursuant to which OEHHA would be permitted to disregard invalid science or insufficient scientific evidence and list under Proposition 65 anyway. If a chemical is not proven to cause cancer, its manufacturer or importer most likely would not choose the short cut provided for in the HCS. The California public, however, would not be given this choice.

The clear language in subsections (a) and (b) of Section 25249.8 reflect the intent that the Labor Code Listing Mechanism was meant to be the “essentially automatic” procedure OEHHA has always referred to, and that the other three listing mechanisms were meant to involve discretion and scientific evaluation. Agencies have no discretion to promulgate regulations which conflict with the governing statute. Ontario Community Foundation, 35 Cal. 3d at 816. Proposed Subsection (a)(3) is invalid because it conflicts with and disrupts the statutory listing mechanism scheme

2. Proposed Subsection (a)(3) is Invalid Because it Conflicts with the Only Reasonable Alternative—the Authoritative Bodies Mechanism.

Proposed Subsection (a)(3) would circumvent the Authoritative Bodies Mechanism because it allows OEHHA to list from the NTP's RoC without being required to consider the underlying science. After the HCS amendments, the only permissible method to list under Proposition 65 by reference to the NTP's RoC is under the Authoritative Bodies Mechanism. Under this mechanism, OEHHA must consider scientific data that an authoritative body did not take into account that shows that a chemical does not cause cancer, and the public may object to a listing based on the sufficiency of the scientific evidence. 27 CCR § 25306(e)-(g); Brown, 196 Cal. App. 4th at 243; Exxon Mobil Corp. v. OEHHA, 169 Cal. App. 4th 1265, 1269 (2009).

Because the public would be denied the opportunity to object to OEHHA's choice under the HCS to follow the NTP's listings if OEHHA lists as proposed, it not reasonable that OEHHA would deny the California public the benefits of and protections against unwarranted listings afforded by an already existing listing alternative—the Authoritative Bodies Mechanism.

A regulation is not valid unless it is consistent with and not in conflict with the statute it implements and is reasonably necessary to effectuate the purpose of the statute, court decision or other provision of law. APA §§ 11342.2, 11350(b). See Ontario Community Foundation, 35 Cal. 3d at 816. Proposed Subsection (a)(3) is invalid because it conflicts with the more reasonable statutory alternative. More importantly, this invalid alternative to the valid Authoritative Bodies Mechanism cannot be construed as "reasonably necessary."

VII. PROPOSED SUBSECTION (a)(4) IS INVALID BECAUSE IT IS AMBIGUOUS AND UNNECESSARY.

A. Proposed Subsection (a)(4) is Ambiguous.

OEHHA again misleads the public. It claims it may list carcinogens identified by the IARC "Monographs on the Evaluation of Carcinogenic Risks to Humans" by reference either to Labor Code Section 6382(b)(1) or Section 6382(d). Statement of Reasons at 10. The analysis of proposed Subsection (a)(3) above shows that OEHHA no longer has the statutory authority to list chemicals from the IARC Monographs by reference to Labor Code Subsection 6382(d)'s reference to the HCS because OSHA no longer requires classifiers to follow the IARC's identifications. The proposed regulation and the Statement of Reasons should accurately reflect OEHHA's ability to list from the IARC Monographs by reference to Labor Code Section 6382(b)(1).

B. Proposed Subsection (a)(4) is Unnecessary.

Subsection (a)(4) does not meet the APA's "necessity" standard because the courts have already established that OEHHA can list from the IARC Monographs by reference to Labor Code

Section 6382(b)(1), provided it finds that the IARC listings meet the standard of “known to the state to cause cancer.” E.g., SIRC v. OEHHA, 210 Cal. App. 4th 1082. It is not reasonable for OEHHA to spend public funds promulgating a regulation the public does not need.

VIII. THIS PROPOSED REGULATION IS INVALID BECAUSE OEHHA FAILED TO PERFORM AN ECONOMIC IMPACT ANALYSIS.

The APA requires that the economic impact of a regulation be assessed for adverse impact on business enterprises and individuals. APA § 11346.3(c)(1). An agency is required to assess how its proposal would affect the competitive advantages and disadvantages for businesses, and if a proposed regulation will have an estimated economic impact in an amount exceeding \$50 million dollars, it is considered a “major regulation” and is subject to further requirements. Id. at §§ 11346.2, .3, 11343.548. OEHHA’s Chief Counsel, Carol Monahan-Cummings, admitted at the June 17, 2013 Workshop that OEHHA has not performed an Economic Impact Analysis of this proposed regulation, even though its “concept proposal” indicated there would be no economic impact from the proposed regulation.

OEHHA misleads the public by maintaining that “there will be no economic impact related to this proposed regulatory language,” and that “[T]he amendments do not impose any costs because businesses are already subject to Proposition 65. Statement of Reasons at 14. OEHHA makes this claim in the purported “Economic Impact Analysis,” which is attached to the Statement of Reasons.

This proposed regulation gives OEHHA the authority to list chemicals from more sources than what Proposition 65 authorizes without being required to review the underlying science. This significant broadening of OEHHA’s scope of authority would necessarily broaden the number of businesses, products, consumers and industries that will be subject to Proposition 65 regulation. Without scientific review of the listings, this proposed regulation is likely to require certain businesses to place false warnings on their products, adversely affecting those products, increasing prices, skewing markets and altering trade balances in industries such as agricultural packaging. Businesses are already experiencing the immediate economic impact of this proposed regulation by incurring significant legal fees to oppose it. There is a marginal economic impact of OEHHA’s proposal and OEHHA’s assertion that businesses are already subject to Proposition 65 fails to acknowledge or address the marginal adverse economic impact of OEHHA’s proposal.

OEHHA has been made aware in the recent past of the likely economic impact to the public and the California economy if it were to list styrene as a “chemical known to the State of California to cause cancer.” OEHHA was made aware that this would immediately cause deselection of styrene-based products in California industries generating billions of dollars, and that this would harm not only those who produce and use styrene-based products, but also consumers, the environment and the public health. See e.g., Briefs filed in SIRC v. OEHHA, Sacramento

Superior Court Case No. 34-2009-0053089-CU-JR-GDS (2009). Its effect on packaging for agricultural products, for example, would have a significant adverse economic impact on the \$1 billion export market for California table grapes.

OEHHA was aware of the potential economic impacts of this proposed regulation but did not perform the required analysis. OEHHA further was required to comply with the “major regulation” provisions of the APA because it knew (or should have known) this proposed regulation could have an estimated economic impact exceeding \$50 million. Failure to comply with the APA nullifies a regulation. Kings Rehab. Center v. Premo, 69 Cal. App. 4th 215, 217 (1999). OEHHA has acted arbitrarily and abused its discretion by claiming “no economic impact” without performing the required economic impact analysis under the APA. This proposed regulation is invalid.

IX. PROPOSED SUBSECTIONS (b) AND (d) ARE INVALID UNDER PROPOSITION 65 AND OEHHA’S ESTABLISHED PROCEDURES.

A. Proposed Subsection (b) is Inconsistent with the Notice Provision for Listings under the Authoritative Bodies Mechanism.

Proposed Subsection (b) is invalid because it conflicts with another OEHHA listing mechanism regulation. A regulation which conflicts with an existing regulation is subject to being declared invalid. APA § 11349.1(d)(4). Such a regulation also is subject to being declared invalid if an agency does not identify the manner in which the conflict may be resolved. Id.

The first conflict is that OEHHA proposes 45 days advance notice to the public of its intent to list a chemical under the Labor Code Listing Mechanism, but it provides 60 days advance notice to the public of its intent to list chemicals under the Authoritative Bodies Mechanism. See 27 CCR § 25306(i).

OEHHA does not clearly explain why a shorter notice period is justified or how this conflict may be resolved except to say that “[s]ince the listing procedure for this mechanism is ministerial and therefore essentially automatic, OEHHA restricts comment to the identification of a chemicals and not the underlying scientific determinations supporting the identification.” Statement of Reasons at 13. If OEHHA is proposing that the public is not entitled to 60 days advance notice because OEHHA is not going to permit the public to comment on the science, then OEHHA is required to inform the public of this rationale. Proposed Subsection (b) also must clearly disclose to the public that the people of the state will not be permitted to address the underlying science.

Second, because OEHHA proposes to list by reference to the NTP’s RoC under a new method which is not “essentially automatic,” the public should be allowed to comment on OEHHA’s underlying scientific determinations, just as it is permitted to do pursuant to OEHHA’s regulation regarding the Authoritative Bodies listings. See 27 CCR § 25306(i). Proposed

Subsection (b) cannot be valid unless it is consistent with OEHHA's new interpretation and its existing regulation.

B. Proposed Subsection (d) is Invalid Because It Conflicts with the Authoritative Bodies Mechanism and Would Violate Due Process and Freedom of Speech.

Proposed Subsection (d) is invalid because it is arbitrary and inconsistent. See APA §§ 11342.2, 11349.1(d)(4). OEHHA asserts that the Labor Code Listing Procedure is "essentially automatic," but it does not propose to "essentially automatically" remove chemicals from the Proposition 65 list which are no longer identified by reference in Labor Code Section 6382(b)(1) or Section 6382(d). OEHHA proposes to the public that chemicals will automatically be placed on the Proposition 65 list if they are identified by reference to the Labor Code, but it also proposes to the public that when those chemicals are no longer identified by reference to the Labor Code, it will not take them off the Proposition 65 list until they undergo a different and much more involved review procedure. OEHHA does not inform the public that its proposed delisting process means that chemicals remain on the list long after they have been delisted by the original listing body (and are not "known" to cause cancer).

It is arbitrary and inconsistent to deny the public the benefit of the Authoritative Bodies Listing Mechanism's scientific review process for listing chemicals by reference to the NTP's RoC, and, within the same proposed regulation, to deny the public prompt removal of chemicals from the Proposition 65 list if they are no longer proven to cause cancer.

Under OEHHA's rationale, an application on a mobile phone could perform its listing functions, but delisting would require an involved process during which a chemical which is no longer known to cause cancer would remain on the list indefinitely. OEHHA justifies this arbitrary procedure with the following:

This subsection also explains that until the appropriate committee has considered whether the chemical must be delisted, the chemical remains on the list. This will reduce potential confusion that could occur if a chemical were to be de-listed, and then relisted again if the committee determines it is known to cause cancer or reproductive toxicity, and is consistent with the delisting processes used for the other three listing mechanisms.

"Confusion" is not a reasonable justification to keep chemicals on the list which do not belong there based on Proposition 65's language. It is unlawful to require California businesses to be subject to Proposition 65's warning requirements for any period of time if a chemical is not proven to cause cancer. Moreover, it is alarmist and poor scientific practice for the public to be warned falsely that a product causes cancer. Finally, OEHHA must justify to the public why it aims to be consistent with the other three listing mechanisms when delisting chemicals but why

it is proposing to be inconsistent with the other three listing mechanism when listing chemicals. See APA § 11349.1(d)(4).

There is no valid reason why an application on a mobile phone could not perform the delisting function of a Labor Code Listing if it could perform the listing function. OEHHA would violate the due process and freedom of speech rights of the businesses and individuals who are subject to Proposition 65 warning requirements by failing to delist chemicals immediately upon findings by the original listing sources that the chemicals no longer cause cancer. Proposed Subsection (d) is invalid because it arbitrarily and unlawfully subjects the public to two different procedures which harm the public and benefit only OEHHA.

X. THE PROPOSED REGULATORY PROCESS VIOLATES DUE PROCESS AND FREEDOM OF SPEECH, AND IT IS PREEMPTED BY FEDERAL LAW.

A. OEHHA Has Violated the Public's Right to Due Process by Failing to Follow the APA's Procedural Requirements.

The Fourteenth Amendment protects individuals from unreasonable, arbitrary and capricious laws and regulations by affording them due process under the law. See Goldberg v. Kelly, 397 U.S. 268 (1970). Hence, agencies are subject to administrative procedural rules to protect the public from regulations which have been promulgated without effective and meaningful notice and without effective opportunity to be heard. Armistead v. State Personnel Board, 22 Cal. 3d 198, 204 (1978). Rules which are made behind closed doors without public input are null and void. Kings Rehab. Ctr., Inc. v. Premo, 69 Cal. App. 4th 215, 217 (1999). The California Supreme Court stated the following in Armistead v. State Personnel Board:

A major aim of the APA was to provide a procedure whereby people to be affected may be heard on the merits of proposed rules. Yet we are here requested to give weight to section 525.11 in a controversy that pits the board against an individual member of exactly that class the APA sought to protect before rules like this are made effective. That, we think, would permit an agency to flout the APA by penalizing those who were entitled to notice and opportunity to be heard but received neither.

Under sections 11371(b), 11420 and 11440 of the APA, rules that interpret and implement other rules have no legal effect unless they have been promulgated in substantial compliance with the APA.

Therefore section 525.11 merits no weight as an agency interpretation. To hold otherwise might help perpetuate the problem that more than 20 years ago was identified in the First

Report of the Senate Interim Committee on Administrative Regulations, *Supra*, as follows (at pp. 8-9):

“The committee is compelled to report to the Legislature that it has found many agencies which avoid the mandatory requirements of the Administrative Procedure Act of public notice, opportunity to be heard by the public, filing with the Secretary of State, and publication in the Administrative Code.

“The committee has found that some agencies did not follow the act’s requirements because they were not aware of them; some agencies do not follow the act’s requirements because they believe they are exempt; at least one agency did not follow the act because it was too busy; some agencies feel the act’s requirements prevent them from administering the laws required to be administered by them; and many agencies . . . believe the function being performed was not in the realm of quasi-legislative powers.”

Id. at 205-06.

As these comments have shown throughout, OEHHA fails to provide effective notice of the purpose and effect of this proposed regulation. It misleads the public throughout by claiming it is not subject to the APA in this regulatory action and by failing to give meaningful reasons for what it proposes to do. OEHHA did not perform the required Economic Impact Analysis, yet it told the public not only that it did perform one and that it did not find any economic impact. In the June 17, 2013 workshop, OEHHA admitted it had done no economic analysis. OEHHA states that the purpose of this proposed regulation is simply to provide information about the way it lists chemicals, but it is difficult, and perhaps impossible for the public to know from its Statements of Reasons how OEHHA proposes to depart from its past practices.

OEHHA has deprived the public of meaningful and effective public participation in this “pre-regulatory concept proposal.” It cannot enact a regulation which will subject California citizens to Proposition 65 without affording them due process under the law.

B. This Proposed Regulation Would Violate the Public’s First Amendment Freedom of Speech Rights.

OEHHA also cannot enact a regulation which would have the effect of compelling businesses to provide false warnings on their products stating that the products are known to the state to cause cancer. The First Amendment right of freedom of speech includes the right not to speak. Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651 (1985). This right protects

commercial speech, and it extends to statements of fact and opinion. Id.; Riley v. National Fed'n of the Blind, 487 U.S. 781, 797-98 (1988).

This regulation gives OEHHA the authority to list chemicals without consideration of scientific evidence which may show that those chemicals do not cause cancer. California businesses could be required to make false and damaging statements about their products. They would be required to comply with OEHHA's opinion that a chemical causes cancer rather than with a known fact. Proposition 65 is meant to protect against false warnings by requiring that OEHHA find that a chemical is "known" to cause cancer or reproductive toxicity. This proposed regulation would violate free speech rights of businesses compelled to comply with it.

C. This Proposed Regulation is Preempted by Federal Law.

The proposed provisions of this regulation that are based on a new interpretation of OEHHA's listing authority by reference to Labor Code Section 6382(d) will create a conflict between Proposition 65 and federal HCS requirements. When Proposition 65 was enacted, the HCS contained the floor lists referenced in 29 C.F.R. 1910.1200 subsections (d)(3) and (d)(4). Because Proposition 65 gave OEHHA the authority to list only the chemicals within the HCS which were required to be identified under the HCS as carcinogens, a listing under Proposition 65 and its corresponding warning requirements would not have conflicted with an HCS required identification and warning requirements.

The amended HCS did not change OEHHA's listing authority to list only from the HCS floor lists. If OEHHA lists instead under OSHA's optional classification criteria, chemical classifications undertaken for purposes of Proposition 65 potentially will conflict with federal chemical classifications by chemical manufacturers and importers. The HCS classification criteria are based on a weight of the evidence evaluation. Manufacturers or importers will not classify as carcinogens chemicals for which there is inadequate or invalid scientific evidence of carcinogenicity, but OEHHA is proposing to classify chemicals for Proposition 65 regulation under the shortcut provided for in the HCS which would allow OEHHA to classify such chemicals as carcinogens. This will create conflicting workplace requirements and product label warnings.

OSHA amended the HCS in order to create uniformity within the United States and abroad:

The revisions to the HCS will standardize the hazard communication requirements for products used in U.S. workplaces, and thus provide employees with uniform and consistent hazard communication information. Secondly, because these revisions will harmonize the U.S. system with international norms, they will facilitate international trade.

OSHA, "Final Rule Summary," 77 FR at 17,604 (2012).

In 1997, OSHA approved of the incorporation of Proposition 65's occupational applications into the California Hazard Communication Standard to ensure that Proposition 65 would not create conflicts between the state and federal hazard communication standards and to ensure that Proposition 65 requirements would not place an undue burden on products distributed or used in interstate commerce. Hazard Communications, 62 Fed. Reg. 31,159-01 (1997).

OSHA reviewed the Proposition 65 statutory framework and corresponding OEHHA regulations which existed at that time and concluded that Proposition 65 would not create a conflict between the state and federal standards. Id. OSHA's decision was based in part on the assumption that because "Proposition 65's 'list' is based . . . upon the 'floor lists' used in the Federal standard," Proposition 65 listings based on a reference to the HCS would necessarily include the same chemicals that OSHA requires to be classified as hazardous. Id. at 31,170-74. (citing the Proposition 65 Labor Code Listing Mechanism).

A new OEHHA regulation which would permit conflicting chemical classifications will disrupt the uniformity and harmony which the federal HCS seeks to create and will undermine OSHA's 1997 approval of Proposition 65 within the state hazard communication standard.

In Shell Oil Co. v. U.S. Dept. of Labor, 106 F. Supp. 2d 15, 21 (D.C. Dist. Ct. 2000), the court addressed issues related to the incorporation of Proposition 65 into the state hazard communication standard. The court found that OSHA's approval of Proposition 65 into the state plan was based on OSHA's conclusion that "there were in fact only a few technical differences between the regulatory scope of Proposition 65 and the federal standards." Id. The court noted that one reason the two schemes were found to be consistent was that a chemical would not appear on either list unless statistically significant evidence based on valid scientific principles supported its classification. Id. To the extent that this proposed regulation allows OEHHA to list chemicals under Proposition 65 which are classified as carcinogens by the NTP but which would not be classified under the HCS criteria as carcinogens, it is preempted by federal law. See id.

XI. CONCLUSION.

In 2009, the Sacramento Superior Court enjoined OEHHA from listing styrene under the Labor Code Listing Mechanism by reference to the IARC Monographs because it had insufficient evidence that styrene causes cancer. In 2012, the Court of Appeal upheld the Superior Court's decision and admonished OEHHA that courts will not defer to OEHHA's interpretation of its authority under the Labor Code Listing Mechanism.

In 2013, OEHHA again attempted to list styrene under the Labor Code Listing Mechanism, this time based on the NTP's listing, whose scientific validity is disputed worldwide. OEHHA did not tell the public in its NOIL for styrene that the federal Hazard Communication Standard no longer requires the substances on the NTP's list to be classified as carcinogens and that, therefore, OEHHA did not have the authority to list styrene under Proposition 65. OEHHA also did not tell

the public that it intended nevertheless to list styrene based on its discretionary application of the HCS classification criteria. OEHHA Chief Deputy Director Alan Hirsch stated the following, just after OEHHA had decided for the first time to test its new interpretation of its Labor Code listing authority, in response to a letter from APTCO, LLC questioning this unwarranted listing:

As was explained in the Notice of Intent to List styrene and the workshop notice, the topic for the workshop has been limited because listings under the Labor Code mechanism established in Health and Safety Code section 25249.8(a) are *ministerial*. The courts have determined that the Office of Environmental Health Hazard Assessment (OEHHA) *has no discretion* not to list a chemical if it has been *identified* by reference in the Labor Code as causing cancer. *Discussion of the scientific basis* for the National Toxicology Program (NTP) finding that styrene causes cancer in animals *is therefore not relevant to the decision OEHHA must make*.

February 4, 2013 letter to Scott Hakl, Plant Operations Manager, APTCO, LLC, from Alan Hirsch, OEHHA (emphasis added).

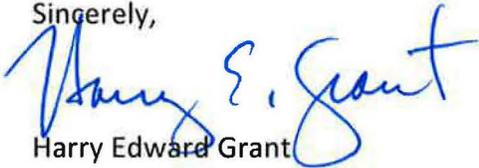
OEHHA withdrew its NOIL for styrene after its Chief Counsel admitted in a public workshop on February 14, 2013 that the NTP's list is no longer a required listing and that OEHHA's authority to list from the NTP's RoC based on the federal Hazard Communication Standard "is now a little more difficult to follow" and in the past, "the federal Hazard Communication Standard was a little more straightforward."

In April, the Sacramento Superior Court again enjoined OEHHA. This time the court ordered OEHHA to remove BPA from the Proposition 65 list because OEHHA had ignored a unanimous finding by the state's panel of scientific experts that BPA had not been clearly shown through scientifically valid testing to be a reproductive toxicant. OEHHA again had attempted to list a substance which it did not have the authority to list. American Chemistry Council v. OEHHA, No. 34-2013-00140720, Order Granting Plaintiff American Chemistry Council's Motion for Preliminary Injunction (April 2013).

There are rules to protect the public from the arbitrary, capricious and unlawful acts of administrative agencies. OEHHA has broken these rules. This proposed regulation is OEHHA's solution to the constraint it faces when it must stay within the clear and long-established bounds of its statutory authority. OEHHA's only reasonable alternative is to withdraw this

regulation now before the Sacramento Superior Court is required to review its validity. It is unlikely the court will be sympathetic to OEHHA's persistent departures from its statutory authority.

Sincerely,



Harry Edward Grant

of

RIDDELL WILLIAMS P.S.¹

cc: Mr. Scott Haki, APTCO, LLC

¹ APTCO's comments were co-authored by Margaret Cerrato-Blue, California State Bar No. 162031.