



July 31, 2013

Monet Vela  
Office of Environmental Health Hazard Assessment  
1001 I Street,  
Sacramento, CA 95812  
[P65Public.Comments@oehha.ca.gov](mailto:P65Public.Comments@oehha.ca.gov)

**Re: Labor Code Workshop**

Dear Monet Vela:

On behalf of the Natural Resources Defense Council (NRDC), which has 1.3 million members and activists, 250,000 of whom are Californians, we write in support of OEHHA's regulatory concepts for listing chemicals by reference to the California Labor Code.

OEHHA's conceptual approach to Proposition 65 listings under the California Labor Code is consistent with the language of the Proposition and with case law interpreting the Proposition. The concept represents an appropriate and welcome clarification of the process for listing chemicals pursuant to the Labor Code mechanism.

Case law firmly establishes that Proposition 65 requires the listing of carcinogens and reproductive toxins identified by reference in Labor Code Sections 6382(b)(1) and 6382(d). *California Chamber of Commerce v. Brown*, 196 Cal. App. 4<sup>th</sup> 23 (1<sup>st</sup> Dist. 2011); *Styrene Information and Research Center v. Office of Environmental Health Hazard Assessment*, 210 Cal. App. 4<sup>th</sup> 1082, 1087 (3<sup>rd</sup> Dist. 2012). Case law also states that only those chemicals for which there is sufficient evidence of carcinogenicity or reproductive toxicity in either humans or animals may be listed. *Id.* at 1087, 88.

***Chemicals on the Director's List***

Pursuant to Labor Code § 6382(d), OEHHA must list "any substance within the scope of the federal Hazard Communication Standard (29 C.F.R. Sec. 1910.1200)" if it is identified based on sufficient evidence of carcinogenicity in animals or humans, "in addition to those substances on the [Department of Industrial Relations'] director's list of hazardous substances." *Styrene*, 210 Cal. App. 4<sup>th</sup> at 1087; Cal. Labor Code § 6382(d).

Because the chemicals on the Director's list are plainly referenced in California Labor Code § 6382(d), OEHHA appropriately proposes in the conceptual regulatory text to list any chemicals included in the Director's list based on sufficient evidence of

carcinogenicity or reproductive (including developmental) toxicity in animals or humans.

### ***IARC Carcinogens***

Carcinogens identified by the International Agency for Research on Cancer (IARC) are referenced in Labor Code Sections 6382(b)(1) and must therefore be listed. Pursuant to Labor Code § 6382(b)(1), OEHHA must list substances identified as human or animal carcinogens by the International Agency for Research on Cancer (IARC). *Styrene*, 210 Cal. App. 4<sup>th</sup> at 1087. Therefore, OEHHA's regulatory approach of listing chemicals identified as carcinogens by IARC in IARC groups 1, 2A or 2B, as long as they are based on sufficient animal or human evidence of carcinogenicity is consistent with the statutory text and case law.<sup>1</sup>

### ***Chemicals within the Scope of the Federal Hazard Communication Standard, Including National Toxicology Program Carcinogens***

OEHHA is right to propose listing any chemicals identified as causing cancer or reproductive (including developmental) toxicity referenced in the federal Hazard Communication Standard (HCS), 29 C.F.R. § 1910.1200, subpart Z, if there is sufficient evidence of either effect in animals or humans. *See Styrene*, 210 Cal. App. 4<sup>th</sup> at 1087; Cal. Labor Code § 6382(d). We agree with OEHHA's reasoning for listing carcinogens and reproductive toxins included in Appendices A and D of the HCS—namely that employers, manufacturers, and others are required by the HCS to base their warnings, communications, and safety data sheets for harmful chemicals on these appendices. *See Draft Initial Statement of Reasons* 5-10; 29 C.F.R. §1910.1200(d)(2), d(3)(i), (e)(1), (g)(2). Because carcinogenic chemicals identified by the National Toxicology Program in its Report on Carcinogens are thus referenced in Appendices A and D, *id.* at 8-9, OEHHA appropriately proposes to list these chemicals under Proposition 65. Similarly, because IARC chemicals are referenced in the federal Hazard Communication Standard as explained in pages 5-9 of the *Draft Initial Statement of Reasons*, the HCS also provides another basis for listing of IARC carcinogens. *Styrene*, 210 Cal. App. 4<sup>th</sup> at 1087; Cal. Labor Code § 6382(d).

OEHHA could, however, consider clarifying the structure of the provisions listing chemicals referenced in the HCS. Because IARC and NTP listings include an HCS basis for listing, it would be clearer to include the HCS basis for listing as the last and catch-all subsection in Section 25904(a) of the conceptual text, with IARC and NTP listings included as a subset (see example below). The IARC listing subsection could still remain an independent subsection on the basis of Labor Code § 6382(b)(1). This change would make clear that IARC and NTP identifications are referenced in the HCS. For example, the section might read as follows:

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<sup>1</sup> We express no opinion as to IARC Group 3 chemicals, which are currently an issue in ongoing litigation.

*(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.*
- (2) A chemical shall be included on the list if it is identified by the International Agency for Research on Cancer in its IARC Monographs series on the Evaluation of Carcinogenic Risks to Humans (most recent edition), based on sufficient animal or human evidence as:
  - a. Carcinogenic to humans (Group 1)*
  - b. Probably carcinogenic to humans (Group 2A)*
  - c. Possibly carcinogenic to humans (Group 2B)**
- (3) A chemical shall be included on the list if it is identified as causing cancer or reproductive toxicity based on sufficient animal or human evidence by reference in the most recent version of Title 29 of the Code of Federal Regulations, part 1910.1200, subpart Z, Toxic and Hazardous Substances, adopted by the federal Occupational Safety and Health Administration. Such chemical includes, but is not limited to, the following:
  - a. A chemical identified by the International Agency for Research on Cancer, as defined in subsection (2) above.*
  - b. A chemical identified in the latest edition of the National Toxicology Program Report on Carcinogens based on sufficient animal or human evidence as:
    - i. A human carcinogen*
    - ii. A potential human carcinogen***

### ***Provisions on Public Comment, Petitions, and Referral to DARTIC and CIC***

We also support OEHHA's conceptual text to provide for a 30 day comment period on notices of intent to list, to allow citizens to petition for the listing of a chemical under the labor code mechanism, and to refer chemicals to the Developmental and Reproductive Toxicant Identification Committee (DARTIC) or Carcinogen Identification Committee (CIC) when chemicals no longer meet the criteria for listing under the labor code mechanism, the authoritative bodies mechanism or the "formally required" mechanism.

Thank you for considering these comments.

Sincerely,

A handwritten signature in black ink, appearing to be 'Avinash Kar', with a long horizontal flourish extending to the right.

Avinash Kar, JD  
Staff Attorney

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