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Via E-mail to monet.vela@oehha.ca.gov

Monet Vela
Regulations Coordinator
Office of Environmental Health Hazard Assessment
1001 I Street
Sacramento, CA 95812

Re: Comments regarding proposed levels of naturally occurring chemicals in food.
Our File No. 11011-000001

Dear Ms. Vela:

I am writing on behalf of myself and a coalition of trade associations and companies who manufacture, distribute and sell foods and dietary supplements. We appreciate the opportunity to provide comments to the Office of Environmental Health Hazard Assessment ("OEHHA") regarding the proposed levels of naturally occurring chemicals in food. Although we join in the comments submitted by the California Chamber of Commerce, we make four additional points which are based on our understanding that the safe harbor values are intended to apply only to California agricultural products. If our understanding is incorrect, OEHHA should clarify that the safe harbor levels apply regardless of the source of the products.

A. IN COMMERCE, RAW FOOD INGREDIENTS ARE FUNGIBLE COMMODITIES, NOT SEGREGATED BY STATE OF ORIGIN.

The food and agriculture distribution system in the United States is not structured to segregate food ingredients by the state where crops are grown. While some companies may contract with individual growers, the majority of crops sold are not. The current proposal does not reflect the marketplace or the impact of a regulation that only applies to California produced produce.

We note too, that California is geologically diverse. Given this diversity, it would appear that there is little justification for adopting safe harbor levels only for food commodities that originate in this State.

B. OEHHA SHOULD CONSIDER ADOPTING NATIONWIDE STANDARDS BASED ON, OR DERIVED FROM, FEDERAL AND INTERNATIONAL TOLERANCE LEVELS.

We strongly support OEHHA's goals of adopting safe harbor naturally occurring levels for some chemicals. We note that OEHHA has relied upon FDA's Total Dietary Study and other

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federal and international studies and standards. We would encourage OEHHA to adopt the FDA and USDA standard tolerances for lead and other contaminants in foods.

C. OEHHA's PROPOSAL MAY IMPOSE A BURDEN ON INTERSTATE COMMERCE.

A regulation that applies only to California produced unprocessed foods, and does not offer safe harbor protection to commodities produced in other states, may impose an unconstitutional burden on interstate commerce. OEHHA should seek advice of counsel on this matter, and consider the potential impact as part of the rule-making.

We have not researched this issue, but are mindful that where states have adopted standards that conflict with the standards of the rest of the nation, that the Supreme Court has invalidated the state-specific standard. See *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959) (state law requiring specific design of truck mudguards held unconstitutional burden on interstate commerce, as it prejudiced out-of-state truckers.) Although the situation here differs from *Bibb*, the discriminatory impact on out of state farmers may be similar. The proposed regulation appears to offer a material advantage to California farmers that is not available to farmers in other states. Moreover, the findings and rationale for the rule provided in the current proposal in our opinion does not adequately justify a single state regulation – given the diversity of the states' soils which are similar to those in other states (and countries).

D. OEHHA SHOULD CONSIDER THE ECONOMIC IMPACT OF STATE-SPECIFIC REGULATION

OEHHA should consider the economic impact of a regulation that grants safe harbor levels to California produce, but does not grant equal status to produce grown in other states. In general, it is likely: 1) to have an adverse impact on the structure of the supply chain and disruptive effect on existing supply contracts; and 2) to raise prices for California produce and depress prices of the commodities grown in other states, as manufacturers seek to take advantage of the safe harbor level and too many manufacturers chase too few goods.

E. CONCLUSION

We laud OEHHA's goal of making the "naturally occurring" allowance in 27 CCR §25501. Clarity and a reasonable and simple way to apply the allowance have been needed for a long time. Thank you for the opportunity to provide these comments for your consideration.

Very truly yours,



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CRB/dl