

July 7, 2014

**VIA ELECTRONIC MAIL**

Monet Vela  
Office of Environmental Health Hazard Assessment  
P.O. Box 4010  
Sacramento, CA 95812-4010  
E-mail: [P65Public.Comments@oehha.ca.gov](mailto:P65Public.Comments@oehha.ca.gov)

**Re: APTCO, LLC'S Comments Regarding OEHHA's June 20, 2014 Notice of Modification to Text of Proposed Labor Code Listing Regulation**

Dear Ms. Vela:

Riddell Williams P.S. submits these comments on behalf of APTCO, LLC in response to OEHHA's modifications to its proposed Labor Code regulation. While APTCO applauds certain of OEHHA's changes to the proposed regulation, APTCO opposes the ambiguity in OEHHA's modified Subsection (a)(2) and the references to reproductive toxicants in Section (a). Finally, APTCO continues to oppose Section (e) (proposed Section (d) in prior proposal), which OEHHA has not modified.

**Subsection (a)(2) is ambiguous because it does not clearly state that OEHHA may list chemicals solely by reference to OSHA's mandatory list of carcinogens.**

OEHHA states in its June 20, 2014 Notice that it agrees with the parties who have commented on the proposed Labor Code regulation that Appendix D of the federal Hazard Communication Standard (HCS) cannot form the basis for Proposition 65 listings, and OEHHA therefore deleted the language in its Initial Statement of Reasons (ISOR) that discussed Appendix D. OEHHA, however, does not explain to the public in proposed Subsection (a)(2) which identifications of chemicals in the HCS it will refer to when it lists chemicals by reference to Labor Code Section 6382(d).

OEHHA also appears to agree with commenters to its proposed regulation that the federal Occupational Safety and Health Administration (OSHA) eliminated the National Toxicology Program's (NTP) Report on Carcinogens (RoC) and the International Agency for Research on Cancer's (IARC) Monographs as definitive sources within the HCS for identifying chemicals for Proposition 65 listings. See ISOR at 7. In addition, prior to the current modifications to its Labor Code regulation, OEHHA agreed that OSHA also had eliminated the American Conference

of Governmental Hygienists Threshold Limit Values as a definitive source within HCS for Proposition 65 listings.

OEHHA, however, does not explain to the public at all in proposed Subsection (a)(2) that OEHHA may list chemicals by reference to the HCS only from OSHA's mandatory list of carcinogens in 29 C.F.R. Part 1910, Subpart Z. OEHHA also does not explain this to the public its ISOR. The 2012 HCS provides that "[w]here 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. Because this is the only definitive source in the HCS that OEHHA may refer to for Proposition 65 listings, as APTCO and other parties have reminded OEHHA throughout this regulatory process, OEHHA must clearly explain this in its proposed regulation.

If OEHHA does not clearly identify this definitive source, the public may not understand what the following phrase in Subsection (a)(2) means: "A chemical shall be included on the list if it is within the scope of the Federal Hazard Communication Standard and is identified in the most recent version of Title 29 of the Code of Federal Regulations, part 1910.1200."

Agencies may promulgate regulations in part to explain specifically how they perform their authorized statutory duties or to define terms that the public may not understand. See Cal. Gov't Code § 11342.2. Agency regulations must be clear; they may not be confusing or use undefined terms; they must be readily understandable; they must not have more than one meaning; and they must avoid technical terms. Id. at 11342.1-.1, .580; 11349 et seq.

OEHHA's proposed regulation still does not satisfy these requirements because it simply repeats Labor Code Section 6382(d). The public may not be aware of the case law containing the definitive interpretation the courts have applied to OEHHA's listing authority when it refers to Labor Code Section 6382(d) for Proposition 65 listings, and therefore OEHHA must specifically explain to the public in Subsection (a)(2) that OEHHA may list chemicals from OSHA's mandatory list of carcinogens.

Moreover, despite the long-established interpretation of the phrase "within the scope of the federal Hazard Communication Standard," OEHHA has experimented since early 2013 with various other interpretations of this phrase. Because of this, the public is entitled to know definitively that OEHHA agrees not only that it is not authorized to list substances on the basis of the HCS Appendix D Safety Data Sheet rule, the NTP's RoC and the IARC's Monographs (by reference to Labor Code § 6382(d)), but also that it is not authorized to list substances on the basis of the California Department of Industrial Relations' "Director's List," as OEHHA has also proposed to do it in the recent past.

By stating clearly in proposed Subsection (a)(2) that OEHHA is authorized to list substances only from OSHA's mandatory list of carcinogens in Subpart Z of the HCS, and by explaining clearly in

the ISOR that this is the case, the public will better understand the process by which OEHHA identifies chemicals by reference to Labor Code Section 6382(d)(1). The public will also be confident in knowing that OEHHA will follow the established interpretation of its Labor Code listing authority. The Office of Administrative Law will presume that a regulation is not clear if it could be interpreted to have more than one meaning or if it uses terms that are not generally familiar to affected members of the public. 1 Cal. Code Regs § 16(a)(1),(3). OEHHA must therefore clarify Subsection (a)(2) so that the public can understand it.

Finally, OEHHA continues to claim that Subsection (a)(2) is necessary because it “describes the process by which OEHHA identifies chemicals or substances that are ‘within the scope of the federal Hazard Communication Standard,’” (ISOR at 2, 6), but OEHHA does not describe any such “process” in Subsection (a)(2). Regulations must be necessary in order to be valid. Cal. Gov’t Code §§ 11349(1), 11389.1. Because subsection (a)(2) merely repeats Labor Code Section 6382(d) without providing a listing process, OEHHA’s modified regulation does not satisfy the “necessity” requirement of a validly drafted regulation.

**The phrase “reproductive toxicity” must be removed from Section (a).**

Because listings by reference to either Labor Code Section 6382(b)(1) or Section 6382(d) would not permit OEHHA to list reproductive toxicants, it should eliminate the phrase “or reproductive toxicity” from Section (a), where it appears twice, and from Subsection (a)(2). The regulation would be confusing otherwise. OEHHA appears to admit in the ISOR on page 7 that this confusion in the regulation is deliberate when OEHHA explains that it retained this phrase in case OSHA were to amend the HCS in the future to add other bases for classifying chemicals.

To be valid, regulations must be clear, and they must also be written so as to keep agencies completely within the bounds of their statutory authority. Cal. Gov’t Code § 11342.1. Because OEHHA cannot currently list reproductive toxicants by reference to the Labor Code, the Administrative Procedure Act precludes OEHHA from deliberately drafting a regulation that does not clearly reflect its current statutory authority in order to accommodate an unforeseeable future event. See id.

**If OEHHA does not clarify Subsection (a), then Sections (c) and (d) would also be ambiguous.**

Persons wishing to petition OEHHA to add to or remove chemicals from Proposition 65 may have a difficult time understanding which chemicals would be covered under such petitions if OEHHA does not explicitly state in Subsection (a)(2) which list in the HCS it is permitted to list from, and if OEHHA does not remove references to “reproductive toxicity” from Section (a).

**Section (e) continues to be invalid because it is arbitrary and inconsistent, conflicts with other listing mechanisms, violates due process and because OEHHA did not perform the required Economic Impact Analysis.**

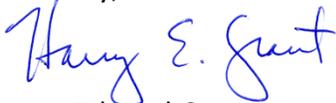
For the reasons set forth in its July 31, 2013 and April 3, 2014 written comments to OEHHA's proposed Labor Code regulation,<sup>1</sup> Section (e) is invalid. In sum, it arbitrarily and unlawfully subjects the California public to two different procedures by not providing that chemicals be automatically removed from Proposition 65 once they no longer meet the requirements for listing via the Labor Code listing mechanism. Moreover, OEHHA has not performed the required Economic Impact Analysis to show that the benefit of allowing chemicals to remain on Proposition 65 when they are no longer "known to the state to cause cancer" outweighs the harm to California businesses that would be negatively impacted by such Proposition 65 listings.

**Conclusion**

APTCO and the other members of the public who have spent their time and resources during this extended regulatory process to educate OEHHA on the only proper interpretation of its Labor Code Listing authority are entitled to see that OEHHA gets it right this time. Even though the California Courts of Appeal have long explained to OEHHA exactly how it may list under Proposition 65 by reference to the California Labor Code, OEHHA ignored the Courts' interpretation of its authority and experimented with other interpretations each time it has proposed a Labor Code regulation in the recent past. It appears now that OEHHA will not depart after all from the established interpretation of its listing authority, but OEHHA does not clearly tell the public this in its modified regulation or in its ISOR.

OEHHA cannot adopt a regulation that does not clearly and unambiguously spell out for the public that OEHHA may list chemicals solely from OSHA's mandatory list of carcinogens in Subpart Z of the federal Hazard Communication Standard, and also that does not clearly convey to the public that OEHHA may not list reproductive toxicants by reference to the California Labor Code.

Sincerely,



Harry Edward Grant

Margaret K. Cerrato-Blue<sup>2</sup>

of

RIDDELL WILLIAMS P.S.

cc: Scott Hakl

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<sup>1</sup> APTCO incorporates herein by reference its prior written comments regarding OEHHA's proposed Labor Code regulation.

<sup>2</sup> California State Bar No. 162031