



July 2, 2014

Monet Vela
 Office of Environmental Health Hazard Assessment
 P. O. Box 4010
 Sacramento, California 95812-4010

Sent Electronically to: P65Public.comments@oehha.ca.gov

SUBJECT: OEHHA's Proposed "Labor Code" Listing Mechanism Regulation

Dear Ms. Vela:

The California Chamber of Commerce and the below-listed organizations ("Coalition") thank you for the opportunity to submit comments regarding the Office of Environmental Health Hazard Assessment's ("OEHHA") notice of changes to the proposed regulation and Initial Statement of Reasons regarding the procedure and criteria OEHHA uses to list and de-list chemicals via the "Labor Code" listing mechanism of Proposition 65.

On March 12, 2014, the Coalition submitted a comment letter expressing several concerns with OEHHA's proposed regulation and Initial Statement of Reasons, as issued on January 27, 2014. Specifically, we stated that (1) subsection (a)(1) invited an overly inclusive interpretation; (2) OEHHA's Initial Statement of Reasons erroneously interpreted "within the scope" of the federal Hazard Communications Standard as amended in 2012 (HCS 2012); (3) subsection (b) unjustifiably precludes public comment regarding whether the sufficient evidence standard has been satisfied; and (4) "confusion" is not a justifiable legal basis to require a chemical to remain on the list pending CIC or DART review.

We are pleased to see that OEHHA agrees with and has elected to address our most fundamental concerns. The purpose of this comment letter, therefore, is to indicate which modifications to the regulation and Initial Statement of Reasons we support and to reiterate previously stated concerns that OEHHA has elected not to address.

1. Subdivision (a)(1)

In our March 12, 2014 comment letter, the Coalition had expressed concern that subdivision (a)(1) as written could invite an overly inclusive interpretation which, in effect, would require the listing of chemicals otherwise beyond Proposition 65's reach. Specifically, as previously written, one could interpret subsection (a)(1) to mean that sufficient evidence of carcinogenicity to animals or humans exist as a matter of law for all Group 2A and 2B chemicals. As we noted in our letter, inviting such an interpretation was not OEHHA's intent, as its Initial Statement of Reasons made it abundantly clear that only those Group 2A and 2B chemicals for which sufficient evidence of human or animal carcinogenicity has been established may be listed under Proposition 65.

In response to our comments, OEHHA has revised subdivision (a)(1)(B) and (a)(1)(C) to expressly state that Group 2A and 2B chemicals may only be listed if there is "sufficient animal evidence."

We support OEHHA's revisions to subsection (a)(1) because the subdivision now accurately tracks the holding in *Styrene Information and Research Center v. OEHHA* ("SIRC") (2012) 210 Cal.App.4th 1082, is consistent with the Initial Statement of Reasons, and no longer engenders confusion.

2. Subdivision (a)(2)

In our March 12, 2014 comment letter, the Coalition had expressed concern that the Initial Statement of Reasons as it pertained to subdivision (a)(2) was flawed because it ignored the fundamental purpose of the HCS 2012, which was to (1) repeal the mandate that employers treat substances listed on IARC's Monograph or NTP's Report on Carcinogens as conclusive findings of carcinogenicity and (2) establish a "weight of the evidence" analysis which directs manufacturers and importers to evaluate their chemicals in accordance with 29 C.F.R., section 1910.1200. Specifically, we noted that OEHHA's position that chemicals under Appendix D are "within the scope" of the HCS 2012 was flawed as a factual and legal matter.

In response to our comments, OEHHA amended its Initial Statement of Reasons to remove language on page 7 that discussed Item 11 of Table D.1 in Appendix D of HCS 2012. In addition, the Initial Statement of Reasons now states that "these changes to the OSHA regulations have resulted in elimination of the express provisions identifying the National Toxicology Program's Report on Carcinogens and the IARC monographs as mandatory bases for classifying chemicals as carcinogens under the HCS."

We support OEHHA's changes to the Initial Statement of Reasons because it removes the faulty language regarding Appendix D and further acknowledges that HCS 2012 repealed the mandate that employers treat substances listed on IARC's Monograph or NTP's Report on Carcinogens as conclusive findings of carcinogenicity.

3. Subdivision (b)

In our March 12, 2014 comment letter, the Coalition had expressed concern that subdivision (b) unjustifiably precluded public comment regarding whether the sufficient evidence standard had

been satisfied. Specifically, in its Initial Statement of Reasons, OEHHA provides the following rationale for limiting the scope of public comments under subsection (b):

Subsection (b) of the proposed regulation provides that at least 45 days prior to adding a chemical that meets the criteria established in section (a) to the list, the lead agency shall publish a notice of intent to list the chemical and provide a 30 day public comment period on whether or not the chemical has been identified by reference in either Labor Code section 6382(b)(1) or 6382(d), or both. Although this notice process is not statutorily required for Proposition 65 listings, it will promote transparency and provide members of the public an opportunity to comment on whether they believe the chemical has been identified by reference in the Labor Code as causing cancer. ***Since the listing procedure for this mechanism is ministerial and therefore essentially automatic, OEHHA restricts comment to the identification of a chemical as causing cancer or reproductive toxicity, not the underlying scientific determinations supporting the identification.***

(Initial Statement of Reasons, p.8.)

OEHHA has not elected not to revise its proposal to specify that the public may comment regarding whether the sufficient evidence standard has been satisfied. We respectfully request OEHHA to reconsider its decision not to address the Coalition's concern.

As noted in our previous comment letter, the *SIRC* court expressly rejected OEHHA's stated position that "the listing procedure for this mechanism is ministerial and therefore essentially automatic." Similar to OEHHA's position in its Initial Statement of Reasons, in *SIRC*, OEHHA argued that the Labor Code listing mechanism "must be read to mean any chemical that meets the criteria set forth in section 25249.8 is, by definition, 'known to the state to cause cancer or reproductive toxicity within the meaning of this chapter.'" (*Id.* at 787.) The *SIRC* court expressly rejected OEHHA's position, stating the following:

As for OEHHA's interpretation of Proposition 65, this too is entitled to little or no deference. As described earlier, for 15 years after enactment of Proposition 65, OEHHA did not even utilize the Labor Code method for listing chemicals solely based on their inclusion in an IARC monograph.

(*Id.* at 789.)

The court then affirmed that a chemical may be listed only if it is known to cause cancer based on sufficient animal or human evidence. In doing so, the court concluded the following:

We conclude the Proposition 65 list is limited to chemicals for which it has been determined, either by OEHHA through one of the methods described in section 25249.8, subdivision (b), or through the Labor Code method of adopting findings from authoritative sources, that the chemical is known to cause cancer or reproductive toxicity. Because the findings in the IARC monograph on which OEHHA relies to list styrene and vinyl acetate do not satisfy that standard, they cannot properly be included on the list on that basis alone. And because OEHHA

does not propose any other basis for including those substances on the list, they must be excluded.

(*Id.* at 790.)

Accordingly, OEHHA's position that listing pursuant to the Labor Code listing mechanism is "essentially automatic" flies in the face of the *SIRC* decision, which expressly held that such a position is "entitled to little or no deference." In establishing a new "sufficient evidence" standard, OEHHA is obligated to provide the public with an opportunity to comment on whether the sufficient evidence standard for a given listing proposal has been established.

4. Subdivision (e)

In our March 12, 2014 comment letter, the Coalition noted that subdivision (d), now subdivision (e), requires a chemical to remain on the list pending review by the Carcinogen Identification Committee ("CIC") or the Developmental and Reproductive Toxicant Identification Committee ("DART"), even *after* a determination by OEHHA that (1) a listed chemical no longer meets the criteria for listing under the Labor Code Mechanism and (2) a listed chemical no longer meets the criteria for listing under Health and Safety Code sections 25306 and 25902. Put another way, a chemical must remain on the list pending review by CIC and DART even if OEHHA determines that there is no basis for including the chemical on the list.

OEHHA's rationale for requiring a chemical to remain on the list pending review is as follows:

This subsection also explains that until the appropriate committee has made such a determination, the chemical remains on the list. ***This will reduce potential confusion*** that could otherwise occur if a chemical were to be delisted pending a committee decision, and then relisted if the committee determines it causes cancer or reproductive toxicity, or both.

(Initial Statement of Reasons, p.8)

"Confusion" is not a legal basis for keeping a chemical on the list after OEHHA has determined that the chemical does not, in fact, meet listing criteria. Absent such a legal basis, OEHHA cannot allow a chemical which does not meet listing criteria to nonetheless remain on the list pending the formal delisting process. Further, 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 known to cause cancer. Moreover, it is alarmist and poor scientific practice for the public to be warned falsely that a product causes cancer.

Unfortunately, OEHHA has elected not to address this issue and continues to rely on "confusion" as a basis for keeping a chemical on the list after OEHHA has determined that the chemical does not meet listing criteria.

We respectfully request that OEHHA consider our suggested modification noted in our original comment letter. Specifically, subdivision (e) must be amended to state that "[t]he chemical shall ***not*** remain on the list pending review by the Carcinogen Identification Committee or the Developmental and Reproductive Toxicant Identification Committee."

5. Subdivision (d)

In newly added subdivision (d), OEHHA provides a mechanism by which a person can petition OEHHA to consider a chemical for delisting under this section. We support this new addition.

Conclusion

Thank you for considering our comments. We appreciate the opportunity to participate in this very important rulemaking process.

Sincerely,



Anthony Samson
Policy Advocate
The California Chamber of Commerce

On behalf of the following organizations:

American Chemistry Council
American Coatings Association
American Forest & Paper Association
Building Owners and Managers Association of California
Consumer Specialty Products Association
California Association of Boutique & Breakfast Inns
California Business Properties Association
California Construction and Industrial Materials Association
California Hotel & Lodging Association
California Manufacturers & Technology Association
California Metals Coalition
California Restaurant Association
International Council of Shopping Centers
International Fragrance Association, North America
NAIOP of California, the Commercial Real Estate Development Association
National Federation of Independent Businesses
National Shooting Sports Foundation
Pactiv
Paint Council network
Personal Care Products Council
Western Wood Preservers Institute

cc: Kristin Stauffacher, Deputy Secretary for Legislative Affairs, CalEPA
Gina Solomon, Deputy Secretary for Science and Health, CalEPA
George Alexeeff, Director, OEHHA
Allan Hirsch, Chief Deputy Director, OEHHA
Carol Monahan-Cummings, Chief Counsel, OEHHA
Dana Williamson, Cabinet Secretary, Office of the Governor

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Ken Alex, Senior Advisor, Office of the Governor
Cliff Rechtschaffen, Senior Advisor, Office of the Governor

AS:cb

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