



May 15, 2015

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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") April 21, 2015 notice of additional changes to the proposed regulation 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. On June 20, 2014, OEHHA published a notice of modification to the proposed regulation. That modification, as we expressed in a July 2, 2014 comment letter, addressed many of our fundamental concerns.

The purpose of this letter, therefore, is to highlight a remaining issue that we believe requires further clarification. Specifically, the April 21, 2015 draft regulation suggests that a chemical listed as causing cancer by the International Agency for Research on Cancer (IARC) must be listed as a Proposition 65 chemical via the Labor Code listing mechanism even if a final monograph for that chemical has not yet been issued. Without a final monograph, there is no way for OEHHA to properly evaluate whether the basis for IARC's determination meets the criteria for listing.

The two references to the Labor Code found in Health & Safety Code Section 25249.8(a) are not direct cross-references to IARC and the federal Hazard Communication Standard. Instead, they are cross-references to a *procedure* to be followed by the Director of Industrial Relations, which results in the identification of substances that shall appear on California's list of hazardous substances, and as a result, also on the Proposition 65 list. By automatically bypassing the procedure required of the Director of Industrial Relations, OEHHA is ignoring important requirements that are designed to ensure industry is not burdened by the reflexive listing of substances that are "not potentially hazardous to human health" or "for which there is no valid and substantial evidence that any adverse acute or chronic risk to human health may occur from exposure." (Labor Code § 6382(a).)

Health & Safety Code Section 25249.8(a) provides that the Proposition 65 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)." This language is noteworthy, both for what it says, and for what it does not say. Before turning to those points, however, it is important to complete the tracing of the statutory language, and placing it in its broader context.

Labor Code Section 6382(b)(1) states, in its entirety: "Substances listed as human or animal carcinogens by the International Agency for Research on Cancer (IARC)."

Labor Code Section 6382(d) states, in its entirety: "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 Sections 6382(b)(1) and (d) are part of a broader legislative regime in the Labor Code that requires the Director of Industrial Relations to establish a list of hazardous substances according to specified procedures. (Labor Code §§ 6380–82.) That procedure includes submitting the list to the Occupational Safety and Health Standards Board for its approval before the Director may finally adopt his list of hazardous substances. (Labor Code § 6380(a).) The Board, in turn, has a statutory obligation to determine whether substances are properly listed, to modify the list as necessary, and to approve the list. (*Id.*) After receiving Board approval, the Director then must adopt the list as a regulation, following a procedure specified in Labor Code Section 6380, which contains a further cross-reference to California's Administrative Procedure Act (Gov't Code §§ 11340 *et seq.*).

Labor Code Section 6382(a) provides that the substances "designated" in subsection (b) (*i.e.*, substances listed as carcinogenic by IARC, and substances within the scope of the federal Hazard Communication Standard) are merely to be "presumed" by the Director to be "potentially hazardous." They shall not be included on the Director's list of Hazardous Substances if the director finds—"upon a showing pursuant to the procedures set forth in Section 6380" (*i.e.*, the Administrative Procedures Act)—that "the substance as present occupationally is not potentially hazardous to human health." (Labor Code § 6382(a).) The Labor Code further provides 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.” (*Id.*)

If the voters had intended to bypass all of the procedures found in the Labor Code, they could have done so. That is, the drafters could have written Health & Safety Code Section 25249.8 to provide that the Proposition 65 list “shall include at a minimum those substances ~~identified by reference in Labor Code Section 6382(b)(1)~~ listed as human or animal carcinogens by the International Agency for Research on Cancer (IARC) and those substances identified additionally by reference in Labor Code Section 6382(d) any substance within the scope of the federal Hazard Communication Standard (29 C.F.R. Sec. 1910.1200).”

But that is not the language that the voters approved. Instead, the voters included the words “identified by reference” and “identified additionally by reference,” and they listed two separate provisions of the Labor Code. Because a court must construe a statute (including an initiative statute) so as to give effect to every term, and not render terms superfluous, that language must have meaning. And what it means is that a substance has not been “identified by reference” to IARC’s list or “additionally identified by reference” to the federal Hazard Communication Standard, unless and until the Director of Industrial Relations has followed all of the procedures required of him in Labor Code Sections 6380 *et seq.*

Further evidence of this meaning is found in the parallel structure of Health & Safety Code Section 25249.8(a) and the two Labor Code sections it cross-references. Health & Safety Code Section 25249.8(a) could also have been written as follows: the Proposition 65 list “shall include at a minimum those substances identified by reference in Labor Code ~~Section~~ Sections 6382(b)(1) and ~~those substances identified additionally by reference in Labor Code Section~~ 6382(d).”

Once again, it was not written that way. Instead, it contains a seemingly odd construction, by referring to those substances “*identified additionally*” by reference to subsection (d). Such verbosity reflects the statutory purpose: to harmonize Proposition 65 with the procedural requirements of the Labor Code. Evidence of this purpose is found in Labor Code Section 6382(d) itself, which states: “Notwithstanding Section 6381, *in addition to* those substances on the director’s list of hazardous substances, any substances within the scope” of the federal Hazard Communication Standard is subject to this chapter. The parallel use of “*identified additionally*” in Health & Safety Code Section 25249.8 and “*in addition to*” in Labor Code 6382(d) show that there are two procedures for “identifying” substances in the Labor Code for possible inclusion on the Proposition 65 list, and that the drafters of Proposition 65 had tracked those two different procedures. One procedure, which applies to several lists including the IARC list, is found in Labor Code Sections 6380 and 6382, as well as the Administrative Procedures Act. Another procedure, which applies to substances within the scope of the federal Hazard Communication Standard, is found in the Code of Federal Regulations.

OEHHA has already recognized this principle to an extent. In its most recent Notice of Proposed Rulemaking regarding Labor Code listing mechanism regulations, OEHHA has

deleted any reference to Labor Code Section 6382(d). It did so in response to comments from several commenters, including this Coalition, that pointed out that the procedure for identifying carcinogens under the federal Hazard Communication Standard had undergone significant changes in 2012 to bring the federal standard into line with international standards. As a result, in its April 21, 2015 Notice of Modification to Text of Proposed Regulation regarding the Labor Code listing mechanism regulation, OEHHA stated, “Additionally, OEHHA considered stakeholder comments submitted in the regulatory process concerning subsection (a)(2) and modified the text to not include potential listing under the HCS in as part of this proposed regulatory action.”

OEHHA’s current proposed regulation therefore shows the following strikeout language:

~~(2) A chemical shall be included on the list if it is within the scope of the Federal Hazard Communication Standard and it is identified in the most recent version of Title 29 of the Code of Federal Regulations, part 1910.1200, adopted by the federal Occupational Safety and Health Administration, as causing cancer or reproductive toxicity based on sufficient animal or human evidence.~~

In effect, OEHHA has recognized that the Health & Safety Code cross reference to Labor Code Section 6382(d) was a cross-reference to a *procedure* for identifying hazardous substances. When that procedure was changed by amendments at the federal level and was no longer compatible with Proposition 65, OEHHA eliminated it from its proposed regulations.

The same principle must therefore apply to the Health & Safety Code cross reference to Labor Code Section 6382(b)(1). It is not a direct cross-reference to the IARC list. Instead, it is a cross-reference to a *procedure* found in the Labor Code for evaluating IARC-classified substances for potential inclusion on the California Hazardous Substances List. It comes with presumptions, tests, and administrative procedures that must be followed before a substance may be added to the Hazardous Substances List. And a substance cannot be added to the Proposition 65 list via the Labor Code listing mechanism until the procedures required under the Labor Code have been followed to completion.

The California Court of Appeal has twice held that Proposition 65 and the Labor Code are in “*pari materia*” and therefore must be harmonized. *AFL-CIO v. Deukmejian*, 212 Cal. App. 3d 425 n.7 (1989); *California Chamber of Commerce v. Brown*, 196 Cal. App. 4th 233, 243 n.6 (2011). Notwithstanding OEHHA’s past practices with respect to the Labor Code listing mechanism (which are entitled to little deferential weight because they have changed over time), OEHHA must now harmonize its regulations with broader statutory schemes of when they are a part.

Conclusion

Thank you for considering our comments. We appreciate the opportunity to participate in this 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
American Herbal Products 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: Lauren Zeise, Acting Director, OEHHA
Allan Hirsch, Chief Deputy Director, OEHHA
Carol Monahan-Cummings, Chief Counsel, OEHHA
Mario Fernandez, Counsel, OEHHA
Gina Solomon, Deputy Secretary for Science and Health, CalEPA
Dana Williamson, Cabinet Secretary, Office of the Governor
Ken Alex, Senior Advisor, Office of the Governor
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AS:mm