



November 17, 2014

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

Sent via email: P65Public.Comments@oehha.ca.gov

Dear Ms. Vela:

On behalf of a segment of Agricultural Council of California (“Ag Council”), I appreciate the opportunity to comment on the Office of Environmental Health Hazard Assessment’s (“OEHHA”) Request for Public Participation on Potential Regulatory Actions.

Thank you for your continued work on Prop. 65 reform. Ag Council supports the extensive comments provided by the coalition led by CalChamber. Ag Council would like to take this opportunity to underscore the importance of work in the following areas: alternative risk levels for chemicals in foods, the naturally occurring regulation and the use of Interpretative Guidance.

Alternative Risk Levels for Chemicals in Foods

Ag Council appreciates and supports OEHHA’s work in making this section of the regulation more workable for chemicals that occur naturally as a byproduct of cooking. OEHHA may consider deleting subjective terms within the regulation that open it up to legal questions. Additionally, creating baselines for cooked foods – similar to our suggestions in the naturally occurring part of the regulation -- may assist in clarifying and simplifying this piece of the regulation.

Naturally Occurring Regulation

We strongly support the original intent of the naturally occurring regulation, however it needs significant improvement. The original intent of this section is to provide an exemption for chemicals that are naturally occurring, but it has become unusable in its current form.

When a chemical is found in a food product, it cannot be easily distinguished between a chemical that was absorbed due to natural, environmental reasons, or something added through human activity. There is no cost effective way to disprove a chemical was added through human activity. Yet, in the current context of the regulation, this is the only way in which a food company can fully utilize this section of the regulation.

We urge OEHHA to work with the California Department of Food and Agriculture and universities specializing in food production (such as University of California, Davis and

Cal Poly, San Luis Obispo) to develop this piece of the regulation, so that it is based on science. In some cases, a baseline for certain chemicals can be developed that would provide assurances for food companies and consumers. In other cases, a baseline may not work due to the way plants absorb nutrients.

Much of this work has been done in agricultural universities and can be synthesized in a different way in order to create a reasonable path forward for the naturally occurring regulation. However, protections must be given to food producers as regulations in this area are developed. We look forward to working with OEHHA on this effort.

Interpretive Guidance

We support OEHHA's use of Interpretative Guidance ("IG"). IGs offer the business community certainty in otherwise complex and sometimes ambiguous regulatory actions.

While IGs can be useful should litigation come to fruition, they are not legally binding in such a way to prevent lawsuits. Therefore, we urge OEHHA to differentiate IGs so that they may be useful in resolving litigation through pre-trial motions.

Additionally, OEHHA should consider IGs in a way to provide guidance on chemicals required for legal reasons, trade agreements and other important uses such as food safety purposes. IGs are a unique way to provide practical guidance to food companies and to consumers. They provide a rare opportunity to make sense of such a complex regulation and therefore should continue to be utilized.

Regulatory Provisions on Averaging Exposures

We believe that this portion of the regulation has been applied correctly, to date. Averaging, where scientifically appropriate, should continue to be permitted. If not, it could result in over warning in the food industry, which conflicts with the Governor's intent when he initiated the Prop. 65 reform effort. In many cases it is impossible to adjust the ingredients or chemical mix to comply with what would otherwise require a Prop. 65 warning. This is one of the few areas of the law that works and has been implemented correctly by the courts.

Thank you for your continued work on Prop. 65. Given the broad nature of the solicitation for comments, I am hopeful you will accept these high-level recommendations. However, Ag Council looks forward to discussing specific provisions with OEHHA as the proposals unfold.

Sincerely,



Emily Rooney
President

