

California Chamber of Commerce
American Chemistry Council
California Business Properties Association
California Grocers Association
California Independent Oil Marketers Association
California League of Food Processors
California Manufacturers and Technology Association
California Retailers Association
Can Manufacturers Institute
Chemical Industry Council of California
Consumer Specialty Products Association
Grocery Manufacturers Association
Industrial Environmental Association
Western Growers
Western Plant Health Association
Western States Petroleum Association

July 12, 2009

Ms. Cynthia Oshita
Office of Environmental Health Hazard Assessment
1001 I Street
Sacramento, CA 95814

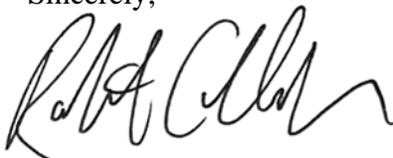
**RE: *Proposition 65: Proposed Listing by the Labor Code Provision
(Carcinogens)***

Dear Ms. Oshita:

Thank you for the opportunity to provide written comments regarding the proposed listing of 11 substances as carcinogens under Proposition 65 via the so-called Labor Code provision. As you are surely aware, this provision has not historically been used as an ongoing mechanism to list substances under Proposition 65.

There is a great deal of controversy regarding the newly created use of the Labor Code provision because it was only used in the initial process of populating the original Proposition 65 list. Because the provision is currently the subject of ongoing litigation, we believe that the Office of Environmental Health Hazard Assessment should withdraw the proposal to list these 11 substances as carcinogens pending the final resolution of the litigation.

Sincerely,



Robert Callahan
Policy Advocate
California Chamber of Commerce

Attachment

COALITION COMMENTS ON THE PROPOSED LISTING OF 11 SUBSTANCES AS CARCINOGENS VIA THE LABOR CODE PROVISION

Use of Labor Code Provision

The California Chamber of Commerce appreciates the opportunity to comment on the pre-proposal concept by the Office of Environmental Health Hazard Assessment (“OEHHA”) to adopt a regulation on adding substances to the list regulated under Proposition 65 by reference to California Labor Code § 6382. The California Chamber of Commerce agrees with many others that the Labor Code provision was intended only to be used to establish an initial list of substances regulated under Proposition 65.

Proposition 65 neither mandates nor authorizes ongoing automatic placement of any chemical identified by reference in Labor Code Section 6382(b)(1) and Labor Code Section 6382(d) on the Proposition 65 list. OEHHA has no authority to add chemicals to the Proposition 65 list unless they meet the criteria outlined in Health and Safety Code Section 25249.8(b). Accordingly, OEHHA’s interpretation of section 25249.8(a) is inherently flawed as the language contained in this section that refers to the Labor Code pertains only to the initial list that was created upon passage of Proposition 65.

The Labor Code provision served its purpose for generating the initial Proposition 65 list, but its proposed new use as a method for continuing to add chemicals to the Proposition 65 list is unwarranted, contrary to good science, and not supported by statute. Importantly, the Labor Code clearly identified the three ongoing mechanisms for adding new substances to the Proposition 65 list.

In the years since initial adoption of the list, OEHHA has appropriately ignored the Labor Code provision in adding substances to the Proposition 65 list – until quite recently. This agency practice amply demonstrates that OEHHA agreed until quite recently that the Labor Code provision is no longer available as an option for adding substances to the Proposition 65 list. There has been to date a failure to justify, or even explain, why this long-standing interpretation has changed.

Traditional Listing Mechanisms are Sufficient and Legally Justified

The three listing methods identified in Health and Safety Code section 25249.8(b) are scientifically compelling and OEHHA should continue to rely on these three methods, and only these three methods, to add substances to the Proposition 65 list. If Proposition 65 is to be truly effective, we must be careful to avoid the trap of adding substances to the Proposition 65 list that do not meet the listing criteria of the Health and Safety Code 25249.8(b).

Various interest groups have registered complaints that too few substances have been added to the Proposition 65 list in recent years. This is not because OEHHA has adhered to Health and Safety Code section 25249.8(b), but rather the fact that fewer and fewer substances are legitimately meeting the listing requirements. With over 700 substances on the Proposition 65 list, it should be no surprise that fewer substances meet the listing criteria today. It would be scientifically inappropriate to lower the listing standards of Proposition 65 simply to be able to continue adding substances to the Proposition 65 list.

From a public health standpoint, warnings lose their meaning when they become too plentiful.

For many years, OEHHA has told the public that there are three mechanisms for listing substances after the initial Proposition 65 list was established. These three mechanisms are detailed in section 25249.8(b) of the Statute:

“A chemical is known to the state to cause cancer or reproductive toxicity within the meaning of this chapter [1] if in the opinion of the state’s qualified experts it has been clearly shown through scientifically valid testing according to generally accepted principles to cause cancer or reproductive toxicity, or [2] if a body considered to be authoritative by such experts has formally identified it as causing cancer or reproductive toxicity, or [3] if an agency of the state or federal government has formally required it to be labeled or identified as causing cancer or reproductive toxicity.”¹

The advantage of initially using the Labor Code was that it provided an expeditious method of generating the initial Proposition 65 list. A disadvantage of using it was that it provided minimal scientific evaluation and rigor. In fact, there was considerable controversy initially over which substances in the Labor Code were “known to the state to cause cancer or reproductive toxicity within the meaning of this chapter.” Because there was no opportunity for scientific input by either the state’s scientists or the “state’s qualified experts” (i.e., the Proposition 65 Scientific Advisory Panel), the decision about which Labor Code substances to include was made administratively and without scientific guidance. This lack of scientific guidance or evaluation in the initial Labor Code listing is borne out by the eventual decision by OEHHA, in a December 8, 2006 notice to delist three substances that were originally added in error by the Labor Code provision.

The three listing mechanisms identified in Health and Safety Code section 25249.9(b) allow greater use of science in determining which substances are placed on the Proposition 65 list. For example, an “authoritative body” listing requires OEHHA to determine whether the authoritative body relied on “sufficient evidence” of carcinogenicity or reproductive toxicity in humans or animals, whereas no such determination is made with Labor Code listings. In addition, authoritative body listings require a determination by OEHHA that a substance has been “formally identified” as causing cancer or reproductive toxicity. Most important, if these criteria are not met, OEHHA is required to refer the chemical to the state’s qualified experts for further evaluation of whether the chemical should be listed. In comparison, the Labor Code provision does not even allow OEHHA or the state’s scientific experts to consider scientific evidence, no matter how compelling, that a chemical does not cause cancer or reproductive harm in humans and therefore should not be added to the Proposition 65 list.

Today, there are more than 700 substances on the Proposition 65 list. The vast majority of the substances on the list today have been placed there by one of the three ongoing methods identified in Health and Safety Code section 25249.8(b). Using the Labor Code provision today to add chemicals to the list would only serve to eliminate consideration

¹ Health and Safety Code 25249.8(b)

of available science and is not supported by statute. The overall purpose of Proposition 65 was and is to protect the public health; an expedited method of listing substances that does not make use of available science is inconsistent with this protection.

The State has sought to provide consistency among the three listing mechanisms identified in Health and Safety Code section 25249.8(b). For example, both the “state’s qualified experts” and the “authoritative bodies” mechanisms require “sufficient evidence” of carcinogenicity or reproductive toxicity, whereas the Labor Code provision does not. The Labor Code provision would lower the bar of scientific evidence required to justify listings. The Labor Code provision would supersede all other listing mechanisms and would effectively obviate the need for Health and Safety Code section 25249.8(b) and its three listing mechanisms.

If OEHHA uses the Labor Code to add substances to the Proposition 65 list it may create conflicts with existing listings for the same substance. Many of the substances currently on the Proposition 65 list with scientifically based qualifications may have to be listed a second time through the Labor Code provision. Substances that were placed on the Proposition 65 list through Health and Safety Code section 25249.8(b) should not be compromised based on a new and statutorily unsupported Labor Code provision.

Ongoing Legal Proceedings Should Be Resolved

In 2006, OEHHA added several chemicals to the Proposition 65 List under a new theory that the Labor Code was a separate and fourth criterion creating an on-going ministerial duty to automatically list chemicals regardless of whether they meet the standards outlined in Health and Safety Code Section 25249.8(a).

Recently, in the case of *Chamber of Commerce v. Schwarzenegger*, CalChamber sued to remove these improperly added chemicals and to prevent OEHHA from acting on its stated intent to add more chemicals on this basis. CalChamber’s suit was coordinated with another pending suit, *Sierra Club v. Schwarzenegger*, which asserts claims about the Labor Code provision among many others. CalChamber’s suit is ongoing and therefore it is inappropriate and a misuse of public resources for OEHHA to proceed with the proposed listing.

In conclusion, we respectfully request that OEHHA withdraw and cease consideration of the proposed listing through the Labor Code provision. If there is sufficient scientific evidence to proceed with listing any of these substances through the three statutorily supported listing mechanisms, then OEHHA should choose that route. If there is not sufficient scientific evidence to proceed through one of the three statutorily supported listing mechanisms, then OEHHA should wait to proceed with listing until the legal field has been cleared.