

## Proposition 65 Advisory

June 6, 2008

### OEHHA to Host Public Workshop for Consideration of Draft Regulations to Implement Newly-Expanded "Labor Code Mechanism" for Listing Chemicals

**Proposal may result in "ministerial" listings of dozens of chemicals not "known to the state to cause cancer or reproductive toxicity" without evaluation by "authoritative bodies" or state's "qualified experts"**

California's Office of Environmental Health Hazard Assessment ("OEHHA") is holding an informal public workshop in Sacramento on June 17, 2008 to evaluate "draft regulatory language" for use in regulations that will be proposed to implement the so-called "Labor Code mechanism" for listing chemicals as carcinogens or toxins under Proposition 65 (the popular name for California's Safe Drinking Water and Toxic Enforcement Act of 1986).

OEHHA's recent writings and assertions concerning the "Labor Code mechanism" appear to elevate provisions of the California Labor Code, which served as the basis for promulgating the *initial list* of Proposition 65 chemicals in 1987, to establish a perpetual mandate to add to the Proposition 65 list any chemical that is: (a) "regulated" as a carcinogen or reproductive toxin under the Federal Hazard Communication Standard administered by OSHA; (b) the subject of a Threshold Limit Value ("TLV") established by the American Conference of Governmental Industrial Hygienists ("ACGIH"); (c) identified in the National Toxicology Program Report on Carcinogens as "known to be human carcinogens or reasonably anticipated to be human carcinogens;" or (d) identified by IARC as Group 1, 2A or 2B carcinogens.

The most significant aspects of this proposal are requirements to list chemicals "regulated" under the Federal Hazard Communication Standard by OSHA and chemicals for which TLVs have been established by the ACGIH. The standards applied for the Hazard Communication Standard and TLVs are not consistent with those established under Proposition 65. In part for this reason, the ACGIH cautions that its TLVs should not be adopted as standards for other purposes "without full compliance with applicable regulatory procedures." ACGIH procedures do not provide notice or opportunity for comment, and the OEHHA proposal would not allow for input from affected parties.

OEHHA's proposal thus is at odds with provisions of Proposition 65 that address the "List of Chemicals Known to Cause Cancer or Reproductive Toxicity." Cal. Health & Safety Code § 25249.8. The statute indicates that a chemical is "known to cause cancer or reproductive toxicity" if (a) "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 (b) "a body considered to be authoritative by such experts has formally identified it as causing cancer or reproductive toxicity," or (c) "an agency of the state or federal government has formally required it to be labeled or identified as causing cancer or reproductive toxicity." *Id.* at § 25249.8(b). The only reference to the Labor Code in Proposition 65 appears in the provision describing the requirement to promulgate and update the list. *Id.* at § 25249.8(a). The California Court of Appeal, in a case explaining the requirements for listing chemicals under Proposition 65, described Section 25249.8(a) as establishing the requirements for formulating the "*initial list.*" *AFL-CIO v. Deukmajian*, 260 Cal. App. 3d 425 (1989).

If the Labor Code provisions are implemented as OEHHA proposes, more than 20 years after the initial list was published, this newly expanded "ministerial" requirement for adding chemicals to the list will largely supersede the statutory bases for listing chemicals as "known to the state to cause cancer or reproductive toxicity" that have been relied upon for the last 20 years under Section 25249.8(b). The proposal will result in the immediate and automatic listing of approximately two dozen chemicals, without opportunity for notice and comment or scientific debate, and without consideration by the

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OEHHA staff or the state's "qualified experts" – the scientists who sit on the State's Carcinogen Identification Committee ("CIC") or Developmental and Reproductive Toxicant Identification Committee ("DARTIC"). Indeed, the role of the CIC and DARTIC will become almost superfluous. Furthermore, many of the "qualifications" that accompanied previous listings for many chemicals – restricting designations of certain chemicals as carcinogenic or reproductively toxic to certain routes of exposure, particle size, or other characteristics – may be removed from the Proposition 65 regulations, so that these chemicals become subject to Proposition 65 requirements even under circumstances where they present no carcinogenic or reproductively toxic hazard.

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