

The Center For Consumer Freedom[®]

July 17, 2008

Carol J. Monahan-Cummings
Chief Counsel
Office of Environmental Health Hazard Assessment
1001 "I" Street
Sacramento, CA 95812

Via e-mail: cmcumings@oehha.ca.gov

Dear Ms. Monahan-Cummings,

I am writing on behalf of the nonprofit Center for Consumer Freedom, a coalition of consumers and stakeholders in the food and restaurant industries. As Proposition 65 enforcement against chemicals in food has become more common (*e.g.*, acrylamide, methylmercury, and the recently proposed listing of caffeine), my organization has become increasingly concerned that consumer warnings may not truthfully reflect the best available scientific knowledge.

OEHHA's Labor Code Mechanism Regulatory Concept holds ample potential to mislead consumers with non-truthful safe harbor notices and warning labels. We understand that the statute, as approved by voters in 1986, provided that the California Labor Code should serve as a baseline for determining which chemicals were covered. But the law was intended to cover pollutants in drinking water—not commercially available foods. And in the intervening years, the California Labor Code's conception of what constitutes a harmful chemical has expanded to include, by reference, practically every chemical substance addressed at the federal level by the Occupational Safety & Health Administration (OSHA). It would be difficult to argue that California's voters intended to throw the floodgates open quite so wide in 1986.

Even if such an argument could be made, the Labor Code mechanism (it is currently proposed) presents OEHHA with a significant problem, one that will be nearly impossible to resolve in an honest fashion.

In your Powerpoint presentation to the OEHHA Pre-Reg Workshop on June 17, you noted that OSHA defines a "hazardous substance" as "any chemical that is a physical hazard or a health hazard"—and a "health hazard" as:

a chemical for which there is statistically significant evidence based on **at least one study** conducted in accordance with established scientific principles that acute or chronic health effects **may occur** in exposed employees.

Contrast this with OEHHA's standard Prop. 65 language, which instructs companies to warn the public that their products contain chemicals "**known** by the State of California to **cause** cancer, birth defects, or reproductive harm."

By adopting a standard based on the California Labor Code, OEHHA will be creating an irresolvable conflict between its own standard (which requires certainty) and OSHA's (which requires mere possibility of causation based on a single study).

Moreover, once OEHHA begins enforcing Prop. 65 against exposure to carcinogens that have been added to the Prop. 65 list by virtue of the Labor Code standard (in cases where the chemicals in question would not have been eligible for listing under the current regulations), the California Attorney General will be subjected to a critical question by every defense attorney:

“Is [chemical X] *known* by the State of California to cause cancer?”

In every case where the Labor Code standard (informed by OSHA's) has been used to add the chemical to your registry, the truthful answer at deposition will be “no.” And OEHHA's ability to enforce Prop. 65 will be severely damaged.

The Center for Consumer Freedom recognizes that there may indeed be cases where the presence of forborne contaminants warrants enforcement under Proposition 65. We have yet to see one, however: The methylmercury cases were ill-advised, as warnings clearly do much public-health harm than good; the acrylamide cases seem based on an incomplete understanding of human toxicology; and the PhIP cases are clearly agenda-driven by an animal rights group that aims to sue (in the words of its own General Counsel) “virtually every restaurant in the state of California that is not serving an all-vegetarian diet.”

It remains an important public-policy goal to ensure that Prop. 65 warnings, when they are issued, rest on truthful, non-misleading, and scientifically accurate information. Basing future additions to the chemical enforcement list on a wishy-washy Labor Code standard will serve no one, and will certainly open OEHHA up to needless attacks by the defense bar, newly armed with a legitimate legal weapon.

OEHHA has been wise in the past to rely on expert panels and international scientific bodies for guidance on chemical additions to the Prop. 65 regulatory list. These mechanisms are more than adequate; the availability in the law of a Labor Code alternative is not reason enough to embrace it. Such a change is fraught with legal contradictions; it's more trouble than it's worth; and its full expression in the regulatory code would create government-sanctioned warnings that have no basis in fact.

Sincerely,



David Martosko
Director of Research
martosko@ConsumerFreedom.com