

# WORKSAFE!

A California Coalition for Worker Occupational Safety & Health Protection

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Re: Draft PEL Process Document

Dear Len & Bob,

Thank you for convening an advisory committee to discuss the process by which Permissible Exposure Limits (PELs) are determined for California workers. We understand the procedural guidelines the Division is preparing will be used to add or revise substances on the airborne contaminant list in Title 8 CCR 5155 or in other sections that may involve a vertical regulation of a toxic material.

The WorkSafe Law Center and WORKSAFE! submit this letter with our comments. WORKSAFE! is a coalition of labor and community groups, individual workers, occupational safety and health professionals, environmentalists, and other interested persons dedicated to promoting occupational safety and health in the workplace in order to preserve the health of all Californians. We are a project of the California Committee on Occupational Safety and Health (CalCOSH). A sister project of WORKSAFE! is the WorkSafe Law Center which is a legal services support project. It focuses on California's most vulnerable workers and provides advocacy support, technical assistance and training to qualified legal services programs about the effective use of workplace and environmental health and safety laws and remedies.

We urge the Division to use the advisory committee process to develop the most health protective regulations for California workers. The law states:

In promulgating standards dealing with toxic materials or harmful physical agents, the board shall adopt that standard which most adequately assures, to the extent feasible, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to a hazard regulated by such standard for the period of his working life. Development of standards under this section shall be based upon research, demonstrations, experiments, and such other information as may be appropriate. In addition to the attainment of the highest degree of health and safety protection for the employee, other considerations shall be the latest available scientific data in the field, the reasonableness of the standards, and experience gained under this and other health and safety laws. Whenever practicable, the standard promulgated shall be expressed in terms of objective criteria and of the performance desired. Labor Code 144.6.

As well, with respect to carcinogens, the law states:

It is the intent of the Legislature that the state shall exercise strong leadership in preventing employees, employers, and other persons from being exposed to carcinogens. In this connection, it is the further intent of the Legislature that the standards board adopt standards for substances as to which there exists a preponderance of evidence of carcinogenicity.... Labor Code 9020 (b).

The Division is required to propose, and the OSH Standards Board is obligated to adopt, PELs that are **health based**. This obligation derives from the fact that the law assures that “no employee will suffer material impairment of health or functional capacity” over a working lifetime of an exposure.

To comply with its mandate to establish health-based standards, the OSH Standards Board must first review the scientific basis of the recommended exposure level. Then it must assess the risk and determine whether the recommended exposure level will protect workers from significant risk. There is no bright line for significant risk. Case law supports the notion that one death in a thousand is certainly significant; the courts have also indicated that one death in a million may not be a significant risk. Although a tolerable level of risk has not been definitively quantified, WORKSAFE! submits that, at the very least, one death in 100,000 is a significant risk. Workers should be protected, at least to the extent feasible, from suffering one excess death in 100,000 due to their workplace exposure.

Once the risk assessment is completed, the OSH Standards Board must determine the feasibility of the health-based exposure level. The Standards Board, however, may not engage in a cost-benefit analysis. The Division’s role in the risk management function is not to preempt the Board’s authority by proposing exposures levels the Division has already adjusted based on risk management concepts. Instead, the Division’s role is to prepare economic analyses of proposed regulations which will assist the Board in determining what adjustments, if any, must be made to the health-based exposure level based on two types of feasibility: technological and economic. The WorkSafe Law Center would be happy to comment further on the law surrounding the promulgation of regulations and to provide citations.

The law states that technological feasibility permits the OSH Standards Board to impose a standard which is **technology forcing**. At the very least, a standard can be set which only the most technologically-advanced plants in an industry have achieved. In fact, the courts permit setting standards that force industry to develop and diffuse new technology, as long as industry is given a reasonable time to develop that new technology.

Economic feasibility is not determined by an analysis of whether compliance with the regulation will be financially burdensome. In fact, a valid standard may threaten the survival of some companies within an industry. A standard is feasible if it does not threaten massive dislocation to, or imperil the existence of, the industry.

Case law also provides guidance on the amount of evidence the OSH Standards Board must have to determine feasibility of a regulation. The courts acknowledge that they cannot require certainty. Rather the agency must act upon the best available evidence. One court noted that “OSHA cannot let workers suffer while it awaits the Godot of scientific certainty.” It may make judgements on the basis of credible sources of information.

The Supreme Court has also reviewed the question of what constitutes substantial evidence with respect to economic feasibility. Cost-benefit analysis is not required - the agency need not specifically weigh industry costs against worker benefits. Instead the agency must provide a reasonable assessment of the likely range of costs for the standard and the likely effects of those costs on industry. This does not require massive data collection. The agency may rely on data and estimates from consultants and even from industry, but can then produce its own estimate modifying the information it received. In the end, feasibility is also addressed in the overall statutory scheme for occupational safety and health which establishes a hierarchy of controls – requiring engineering and work practice controls except to the extent that the employer establishes such controls are not feasible. The court essentially conducts a preliminary test of feasibility in the regulatory or pre-enforcement setting. The agency need not prove a standard is feasible for all employers, at all times, in all jobs. Rather the agency must present reasonable technological and economic evidence and analysis.

In developing the procedures, we ask the Division to keep in mind the statutes and case law which favor worker protection. The Division and the OSH Standards Board are advocates for worker health and safety, and must develop and apply procedures that incorporate this concept. The law does not require consensus or agreement between the regulated community and those the agency is designed to protect. Rather, the law requires the agency to act in the best interest of workers based on sound science. The law does not require balancing worker health with industry profits. Rather, the law requires the agency to protect a worker, to the extent feasible, from “material impairment of health or functional capacity even if such employee has regular exposure to a hazard regulated by such standard for the period of his working life.” An aggrieved employer or industry may challenge in court the economic or technological feasibility findings of the agency. The role of the Division and the OSH Standards Board is not as an impartial judge, but as an advocate for worker health and safety. Our comments follow.

## I. Selection of Substances for Review

**A. Sources of Substances.** This section identifies at least three specific sources. The focus on the American Conference of Governmental Industrial Hygienists (ACGIH) TLVs should not be highlighted nor separated from other private national and international bodies that assess the toxicity of chemicals. We would suggest that the following might be more encompassing and provide a better emphasis:

1. Substances identified by the State of California as carcinogens, reproductive or developmental toxins
2. Substances identified through recognized scientific processes by independent national and international organizations such as IARC, NTP, NIOSH, ACGIH, etc.
3. Form 9 and other internal recommendations from Division staff
4. Substances identified by Cal/EPA's Office of Environmental Health Hazard Assessment (OEHHA) and HESIS staff as chronic toxicants
5. Substances identified by the public or in petitions to the OSH Standards Board.

**B. Setting Priorities among the Substances.** The factors listed in the draft generally seem appropriate, but could be state more succinctly. We would suggest the following:

1. Is there a more protective recommended exposure level from one or more private independent national or international organizations or from state or national governments, generally recognized as utilizing rigorous scientific processes to establish recommended exposure levels?

2. How many workers are affected by the substance?

3. How serious is the nature of the hazard? A substance that has an apparent potential for cancer, reproductive or developmental harm, or a substance that has apparent potential for sensitization is more serious than a substance that causes mild respiratory irritation.

4. Does the more protective recommended exposure level from a group reference in 1 above represent a substantial (as opposed to a small) change from the existing permissible exposure limit?

5. Is it possible to provide the legally required evidence to uphold a health protective standard?

a. Has California already established the scientific basis for the serious nature of the hazard and the threshold concentration for health effects through the process used by the State Environmental Protection Agency?

b. Is evidence from other governmental or private organizations clear and of substantial weight to establish the serious nature of the hazard and the threshold concentration for health effects?

c. Can the Division point to employers who are already meeting the more protective standard (to establish evidence of technological feasibility) or if not, can the Division present credible sources of information regarding the possibility of new technology, assuming industry is given a reasonable time to develop that new technology.

d. Can the Division gather information regarding economic feasibility that will provide a reasonable assessment of the likely range of costs for the standard and the likely effects of those costs on industry.

We want to emphasize here that the Division's role is to develop health-based recommended exposure levels using the best available risk assessment information. It is not the Division's role to recommend a less protective exposure level based on cost and technical feasibility – it does need to gather information for the OSH Standards Board to consider, but it should not adjust a proposal based on risk management data.

We also want to emphasize that the Division's role is not to withhold a proposal from the OSH Standards Board based on failure to obtain consensus. If there is scientific support for a more protective exposure limit, the Division should forward the recommendation to the Board.

## II. Role and Selection of the Technical Expert Advisory Committee

A. **Role of the Committee.** We agree with the concepts.

B. **Selection of technical expert advisory committee members.** We suggest the following initial language:

Technical experts from other state agencies, academic institutions, professional associations, or other interested groups should be considered for membership. Technical experts shall not be precluded because they also represent the affected industry(s) or employee(s), but all should act as independent neutrals when in this role. Experts should recuse themselves from considering substances if there is an apparent conflict and they cannot function as a neutral. The committee should be balanced, to the extent possible, between management and labor.

Additionally, the P&P should explicitly state that members with demonstrated, specific expertise in quantitative risk assessment of chemicals, using accepted, science-based methodologies such as those used by federal agencies like Federal OSHA and EPA and state agencies such as Cal/EPA's OEHHA, must be represented on the committee.

Without this specific expertise, the committee will not be able adequately and efficiently to determine health-based recommendations for exposure levels for high priority substances that pose risks of cancer and reproductive damage. Such high priority substances include 68 chemicals recently identified by WORKSAFE! that are recognized carcinogens and reproductive toxicants in California, but are not identified or regulated by the Division as such and thus there is vastly inadequate protection of workers from these potentially serious health hazards. WORKSAFE! agrees that members may have more than one area of expertise. However, the P&P should state that members' expertise in the stated disciplines (toxicology, epidemiology, occupational medicine, and industrial hygiene) and in quantitative risk assessment must be demonstrated by training and/or relevant work experience. An occupational medicine physician, for example, would have to have demonstrated expertise, through training and /or work experience in toxicology or epidemiology to satisfy the requirements of having "expertise" in these areas.

1. **Areas of expertise.** We would suggest that as to each of the areas, that the level designated is "preferred" and not "required" as it is possible, for example, that an occupational nurse might be a valuable participant in place of an occupational doctor, if no physician were available, s/he had expertise in quantitative risk assessment as demonstrated by training and/or relevant work experience.

2. **Size of committee.** We agree with the concepts.

3. **Process to select members.** We agree with the concepts but suggest that representatives from HESIS and OEHHA be specifically listed and sought as committee members whenever possible. We also suggest a slight change in c. because the goal is NOT to have participants represent a "perspective" but to be neutral even though they come from one side or the other:

c. Recommendations of interested parties, including labor, trade and employer organizations, who recognize that members serve as impartial experts evaluating scientific studies and not as representatives of particular interests.

**4. Staff participation.** We agree with the concepts, but believe that HESIS should participate as a committee member, not merely as staff, so that HESIS can express a point of view. We also believe it would be useful for the Division to add something here to define the extent of the staff service. This might be useful in budget augmentation proceedings.

### III. Advisory Committee Meeting Process

We think we agree in concept with most of the process (it is not completely clear in the proposal however). There are changes that should be made on the Appendix (the Chart) to reflect a more streamlined process.

Prior to the first meeting of the expert committee, the Division should compile an initial list of substances and determine, as best possible, the answers to the questions in I. B. 1 through 4 above. The Division should also notify the public so it can provide written or in person comments to the expert committee regarding priorities.

Ideally, the first meeting would be broadly attended by experts and non-experts. The expert committee would listen to the public regarding 1) establishing the general order of the list to be considered, and 2) which substances need to be addressed in separate advisory committees, and then subsequently develop its meeting schedule and recommend to the Division which substances should have separate advisory committees.

Regarding the initial investigation that the Division will need to make under Section I. B. 1 through 4, the issue of how many people are affected by various chemicals is one that needs special attention because there do not appear to be adequate sources of chemical use information available either in CA or in the country. This information is CRITICAL for setting priorities.

A HESIS contract study conducted by the University of California in 2002 clearly demonstrated there are no existing mechanisms effectively to identify California workplaces where specific hazardous chemicals are used. In the study, UC reviewed, evaluated, and tested existing chemical hazard tracking mechanisms using seven chemicals with chronic health hazards to determine whether the tracking mechanisms were suitable for identifying California businesses where the chemicals are used. The evaluated California chemical tracking systems included the: 1) Business Plan Hazardous Materials Inventories; 2) Accidental Release Prevention Program; 3) Air Toxics Program; 4) CalSites database; 5) Unidocs Hazardous Materials Online Inventory Database; and 6) Wastewater Pretreatment and Pollution Prevention Plans. None of the chemical tracking systems was effective in providing statewide chemical use information.

To evaluate whether chemical use information could be obtained directly, HESIS requested California client lists from 96 manufacturers and distributors of the seven test chemicals. Only 17 of the 96 manufacturers and distributors responded, and only 6 of the 17 respondents voluntarily submitted lists of their California clients for the seven chemicals. Identifying businesses from client lists for specific chemicals voluntarily submitted by manufacturers and distributors was largely ineffective.

The P&P needs to address how it will gather this information on chemical usage.

**A. Public notice and interested party involvement.** We agree with the concepts, but think the P&P should establish some tight criteria for presentations made to the committee by various interested parties. The presentations should be submitted ahead of time to the Division so that it can determine whether or not an in-person presentation will be a good use of the expert committee's time. The presentations should be limited in time and the content should be relevant.

**1. Identifying and notifying interested parties.** We agree with the concepts. We think it would be better to phrase the second paragraph as follows in order to remove what appears to be a bias in favor of industry participation:

The Division will also attempt to contact labor, employer, trade and professional organizations, including chemical manufacturers and users, which it believes may have an interest in particular substances under consideration.

**2. Web posting of notices and meeting materials.** We agree with the concepts.

**B. Committee consideration of relevant science and feasibility documents.** We believe a sentence should be added (second sentence) indicating that great weight or deference shall be given to Cal/EPA's OEHHA's toxicological and scientific assessments when such exist for a substance under consideration with respect to chronic illnesses such as cancer, reproductive and development harm, asthma and other illnesses that result from sensitization.

We also disagree that the goal of the committee in making a PEL recommendation is to strive for a consensus that can be justified scientifically. The goal of the committee, the goal of the Division, and the goal of the OSH Standards Board is to strive for that "standard which most adequately assures, to the extent feasible, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to a hazard regulated by such standard for the period of his working life." Further the goal for carcinogens is to "exercise strong leadership in preventing employees, employers, and other persons from being exposed to carcinogens. In this connection, it is the further intent of the Legislature that the standards board adopt standards for substances as to which there exists a preponderance of evidence of carcinogenicity.

Consensus means that worker health is not the paramount concern. The law contains no requirement for consensus. In fact, the law contains elements that seem to preclude the likelihood of consensus. The job of the agency may well be to force technology, to push the industry and the employer community to develop new ways of working or find safe substitutes to safeguard workers from toxic exposures. Workers are not expected to give their lives in exchange for a job.

Finally, in this section, we would recommend that the paragraph concerning cost and feasibility considerations be stricken. The expert committee and the Division as well may not consider technical and economic feasibility in setting health-based recommended exposure levels. The law is clear that the OSH Standards Board is the agency that may CONSIDER these, but the Board must comply with the law in that regard. It is a violation of the law for the expert committee and the Division to adjust (to reduce the level of protection afforded a worker) a health-based scientifically defensible recommended exposure limit in order to achieve consensus because the industry thinks the regulation will cost too much or is not technically feasible.

The Division may and should solicit information from interested parties regarding technical and economic feasibility after the health-based recommended exposure level is determined. That information should, along with the health-based level, be forwarded to the OSH Standards Board for their consideration.

Finally, much of the factual information the Division seeks at the end of Section C is information that is needed in order to set the priorities at the beginning of this process. This is what the Division needs to do at the outset, not what should be done afterwards.

We have comments on the chart and would be happy to share them with you. It is difficult to do that without showing you our suggestions, but we would be happy to discuss it when we each have the chart in hand. As well our suggestions regarding the chart relate back to the entire process and so when that is finally agreed upon, the chart will hopefully conform.

Thank you for allowing us to provide this response to your proposal.

Sincerely,

Fran Schreiber, Acting Executive Director