

# WORKSAFE!

A California Coalition for Worker Occupational Safety & Health Protection

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September 6, 2006

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Re: Draft PEL Process Document

Dear Len & Steve,

The WorkSafe Law Center and WorkSafe Inc. submit this letter with our comments. WorkSafe is a statewide non-profit organization dedicated to promoting occupational safety and health and eliminating workplace created and related toxic hazards that impact at-risk communities in California through education, training, advocacy, technical and legal assistance. Our Activist Network brings together labor and community groups, individual workers, occupational safety and health and other 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. Our WorkSafe Law Center supports legal services programs, focusing on California's most vulnerable workers and providing advocacy support, technical assistance and training regarding the effective use of workplace and environmental health and safety laws and remedies.

**SCOPE of COMMENTS.** This letter covers general comments and also makes specific comments and provides suggested language in **purple**. References to the Division's proposed P&P are in **blue** and **purple for additional language**.

**First, we support the recommendation for an expert advisory committee to recommend health-based exposure levels, but believe the Division must adequately staff the voluntary Technical Expert Advisory Committee [TEAC].** Although advisory committees are not required by law, traditionally Cal/OSHA and the OSH Standards Board have used advisory committees to help develop regulatory proposals. We generally support that process.

**However, the P&P's proposed TEAC attendance and workload requirements are too onerous.** We suggest that after the meeting where priorities will be set for various substances, that the Division conduct a dedicated literature search to identify relevant toxicological and other health effects data for each substance. Preference should be given to review documents by government agencies such as EPA, OEHHA, NIOSH. Then at the first meeting of the TEAC, the committee can review the literature search, evaluate its workload, and depending on the complexity of the health assessment to be evaluated, the amount of government or peer reviewed summaries, and other factors that impact workload, the Committee with the assistance of the Division can identify resources needed through a temporary contract to address particular substances. **It is unrealistic and unnecessary for a volunteer committee to do primary literature review and the Division must assist the TEAC so that it can efficiently do its work and apply its expertise.**

The TEAC should not perform functions for which Division staff should be responsible. In order for a voluntary TEAC to function properly, if it determines that additional resources are needed to evaluate the literature, then the Division must assure adequate temporary staffing through contract – preferably with agencies such as HESIS or OEHHA (see II.C. below) to secure expertise to assist the TEAC. The Division should consider that without appropriate assistance for the TEAC, it may not be “as effective as” Federal OSHA in the handling of Identification, Classification and Regulation of Carcinogens pursuant to 29 CFR Section 1990. Although the 5155 list is not comprised only of carcinogens, if the criteria set forth in the P&P identify carcinogens as among those substances which have top priority, then much of the initial work of upcoming 5155 committees will in fact focus on carcinogens and thus must conform with the “The OSHA Cancer Policy”.

**Second, the P&P must ensure transparency and a scientific basis for all recommendations and conclusions of the TEAC.** At a minimum, the following specifics must be reported out by the TEAC for any substance it evaluates:

- 1) for any **carcinogen**, a notation of the cancer risk level associated with the **recommendation** of the TEAC;
- 2) for any **carcinogen**, a notation of the cancer risk level associated with the existing PEL, if any exists;
- 3) for any **substance** known to the State of California to cause cancer, reproductive or developmental harm under the Safe Drinking Water and Toxic Enforcement Act of 1986 (Chapter 6.6 (commencing with Section 25249.5) of Division 20 of the Health and Safety Code), **a notation of a health-based exposure level determined by OEHHA adjusted** by OEHHA to account for workplace exposure and other scientific factors relevant to establishing a health-based occupational exposure level **that would result in one excess cancer per ten thousand workers;**
- 4) for any **substance** known to the State of California to cause cancer, reproductive or developmental harm under the Safe Drinking Water and Toxic Enforcement Act of 1986 (Chapter 6.6 (commencing with Section 25249.5) of Division 20 of the Health and Safety Code), **a notation of a health-based exposure level determined by OEHHA adjusted** by OEHHA to account for workplace exposure and other scientific factors relevant to establishing a health-based occupational exposure level that would result in one excess cancer per thousand workers, one excess cancer per one hundred thousand workers, and for other risk levels that the committee deems appropriate or necessary ;
- 5) for any **substance** known to cause a chronic health effect for which there is an existing quantitative risk assessment prepared or published by OEHHA, **a notation of the health-based occupational exposure level**, if any exists, prepared by OEHHA and adjusted by OEHHA to account for workplace exposure and other scientific factors relevant to establishing a health-based occupational exposure level that protects against non-cancer chronic health effects including reproductive or developmental harm, chronic lung disease, and other chronic life-threatening or disabling diseases or illnesses; and

6) for all substances, the committee should clearly report the rationale for recommending any PEL and the health basis for that PEL, to wit, whether the recommended PEL protects against irritation, cancer, liver damage, central nervous system damage, reproductive harm, developmental harm, etc.

We also specifically request that the information above be included in the official record of the Occupational Safety & Health Standards Board [Board] for the promulgation of any regulation regarding a toxic substance to assure transparency in their process and so that the public may challenge the regulation if it is in conflict with the law as minimally set forth in the Labor Code provisions quoted here:

*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.

*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).

**THIRD, WE DO NOT BELIEVE A SECOND ADVISORY COMMITTEE IS NECESSARY OR ADVISABLE.** Convening a second committee which includes, as the proposed P&P clearly states, the ability to override the recommendation of the TEAC is a derogation of the entire process. **It creates a committee that combines risk assessment with risk management, which the Division previously rejected; we previously stated that the Board is the most appropriate entity to evaluate risk management.** This second committee completely negates the work of the expert advisory committee, irrespective of the fact that TEAC members may participate in the second committee. As well, a second committee to consider feasibility will likely stall an already lengthy process. Finally, the feasibility committee provides an unfair advantage to industry because such a committee will not likely have a balanced membership.

Although workers and their representatives would be permitted to provide evidence to rebut what industry presents regarding feasibility, it is not likely they will be able to do so as they do not have the resources to muster the experts needed. A second committee would discredit the entire process because worker representatives will have little chance of impacting the discussion and will be – as many if not all of the regulatory advisory committee that Cal/OSHA convenes – completely outnumbered by industry and employer representatives.

**We have no objection to the Division receiving information from industry and others regarding feasibility. However, this information must be public and subject to on-site verification** by the Division and/or the OSH Standards Board or an independent entity under contract with the Division or Board and paid for by industry (similar to the environmental review process required by the California Environmental Quality Act pursuant to section 21082.1 of the Public Resources Code). But to establish any kind of deliberative body – one which would operate via “consensus” as most other non-expert Cal/OSHA Advisory committees operate – is as we stated above unwarranted and will most likely result in bias against the workers this agency is supposed to protect.

To structure the information the Division will gather, the P&P must clearly state that technical and economic feasibility address the ability to measure workplace exposures at the health-based occupational exposure level and the ability of industry to comply with the health-based occupational exposure level using new or existing technology. **FEASIBILITY DOES NOT INCLUDE REVISITING THE TEAC RECOMMENDATION FOR A HEALTH-BASED OCCUPATIONAL EXPOSURE LEVEL.**

**We hope the Division and ultimately the Board will accept only verifiable evidence that is clear and convincing regarding the lowest exposure level achievable using existing practices or controls.** Should an entity offering technical information refuse access to its facilities to permit verification, if a request to have an on-site is made, that evidence should **NOT BE RECEIVED** in the record. The Division will need to allocate resources to verify evidence industry presents to it and ultimately to the Board, and we remind the Division it has a responsibility to fairly evaluate and test or verify, when possible, evidence brought before it regarding feasibility.

**Further, in order for the Division to carry out its work determining the bona fides of technical and economic feasibility, the P&P should also address staff allocation** (even if it the Administration is unlikely to approve a request for additional technical staff to do this work). Staff should include a special studies unit to be able to verify data presented regarding feasibility. It should also include additional staffing for the Research & Standards Development unit including specific types of technical experts needed for the Division to staff the feasibility process for the OSH Standards Board.<sup>1</sup> We suggest expertise is needed in at least the following areas: engineering with a specialty in ventilation systems, chemical engineering or toxicology (for determining alternatives or substitutes that could be made for a more hazardous toxic substance under consideration), engineering or designing of personal protective gear, evaluating methodologies for collecting and measuring toxic substances.

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<sup>1</sup> It is expected that the Division will both receive information and also develop its own information regarding feasibility in order to staff the OSH Standards Board in its deliberative process. In that role, the Division's analysis should include 1) information on achievable engineering controls and exposure levels from federal and state government entities such as NIOSH and DHS, as well as international entities such as the ILO and EU; 2) reports of the Division's own monitoring and other assessments; and 3) other protection to mitigate the harm that workers will suffer should the Board, having determined it is not technically or economically feasible to adopt the health-based PEL, issue a less protective level. In this latter case, the Division might have suggestions regarding medical surveillance, use of respiratory protection in addition to the PEL (eg. a PEL of 1 ppm plus respiratory protection with an APF of 10), limits on the amount of time a worker may be exposed each day, etc.

Although we have no objection to industry presenting information on costs of compliance, we will continue to point out that California law does not permit a cost-benefit analysis when determining the PEL. We believe the Division's role at this second risk-management investigatory phase is to forward feasibility information to the Board as opposed to preempting the Board's authority by proposing a permissible exposure limit the Division has adjusted and made less health-protective based upon feasibility information or the Division's desire to achieve industry agreement. We incorporate our previous comments to the Division regarding the law in this area.

Finally, we suggest that before the Division issues a final P&P, it should review Title 29 CFR 1990 and any other statutes, regulations and policies of Federal OSHA that may bear on this process to assure that the final P&P meet s our state plan requirements to be "as effective as" Federal OSHA.

Below are additional more specific comments:

## I. SELECTION OF SUBSTANCES FOR REVIEW

### A. Sources of Substances

1. **COMMENT:** We would have included international organizations in the list, but your list of sources is not all inclusive, so we presume that other unnamed organizations may be a source for the selection of the substances for review.

2. **NO COMMENT**

3. **COMMENT:** In item 3, we would propose:

Petition decisions granted by the Cal/OSHA Standards Board and other requests from the public or recommendations of other governmental agencies such as the Department of Health Services and OEHHA.

### B. Setting Priorities among the Substances

**COMMENT:** The information you describe in Section III. C. to be provided by Division staff for the feasibility discussion must be provided at the outset. It is critical to setting priorities among substances and should not be held back. Please move that information to this part of the P&P. We would suggest the following precede that which the Division has written:

*The Division will attempt to obtain the following information and provide it to interested parties before the initial advisory meeting is held to review and set priorities for the entire list of substances.*

1. *Estimates of the extent of use of the substances by California workers (how many exposed, in what industries, in what types of operations, how many locations, etc.)*

2. *What measures, including information on chemical handling practices, spill prevention and control measures, and related exposure levels, are currently in place or available to control worker exposures to the hazardous substances in these industries and operations?*<sup>2</sup>
3. *Estimates of the extent of exposure to the substances (to what degree are workers being exposed as evidenced by air sampling results<sup>3</sup> associated with different operations and exposure control measures, how many workers are being exposed at varying levels of exposure, etc.)*<sup>4</sup>
4. *To the extent it is available, information on incidents of employee injury or illness (acute and chronic) related to exposure to the hazardous substance.*<sup>5</sup>

#### C. Initial advisory meeting

The Division will develop a tentative list of substances for review based on the criteria detailed above, time frames planned for completion, and staff resources available. This list will then be discussed .... The division will use this initial meeting to review procedures and set priorities, .... and determine if any substances should be sent to a separate substance specific advisory committee process. ....

**COMMENT:** First, the P&P should include development of a periodic “docket” to be issued regularly at a specified time each year. For carcinogens on the docket, the Division should specify overall time frames in keeping with and as effective as those in 29 CFR 1990.104(c) for carcinogenic substances. We suggested above that after the meeting where priorities will be set for various substances, that the Division conduct a dedicated literature search to identify relevant toxicological and other health effects data for each substance. Preference should be given to review documents by government agencies such as EPA, OEHHA, NIOSH. Then at the first meeting of the TEAC, the committee can review the literature search, evaluate its workload, and depending on the complexity of the health assessment to be evaluated, the amount of government or peer reviewed summaries, and other factors that impact workload, the Committee with the assistance of the Division can identify resources needed through a temporary contract to address particular substances. **It is unrealistic and unnecessary for a volunteer committee to do primary literature review and the Division must assist the TEAC so that it can efficiently do its work and apply its expertise.**

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<sup>2</sup> There is no reason why national data cannot be used to determine this issue.

<sup>3</sup> Air sampling must be objective and independent or verified, to the degree possible.

<sup>4</sup> There is no reason why national data cannot be used to determine this issue.

<sup>5</sup> There is no reason why national data cannot be used to determine this issue.

Second, the P&P must indicate that the initial advisory meeting will not merely review the Division's priorities, **but also set its own priorities** (see added language above).

Third, the P&P should specify the criteria the Division will use for determining whether a separate substance specific advisory committee process should be initiated.

Finally, the "considerations" the Division will use to set the priorities for the list of substances need to be clarified.

1. Evidence of a serious potential hazard not adequately addressed by existing regulations of the Division or other governmental agency.

**COMMENT:** This statement is confusing. You need to define a serious potential hazard – perhaps as a substance that has an apparent potential for cancer, reproductive or developmental harm, for chronic health damage or for sensitization. And you need to juxtapose other substances that are presumably less serious in that they causes only mild respiratory irritation. You need to state what kind of evidence would be relevant regarding whether the regulation adequately addresses the hazard. Please clarify what other agency you are referring to that would be promulgating worker related regulations – is it DPR for pesticides? ALSO, PLEASE CLARIFY WHAT HEALTH END POINT YOU ARE EVALUATING when you determine whether an existing DOSH regulation adequately protects workers.

2. A substantial change in the value of an OEL that could contribute to increased protection of workers if adhered to by employers.

**COMMENT:** Which OEL are you going to consider? If you are only considering the recommendation of the ACGIH, then we do not agree. Again, the issue of what is the health end point for which you are seeking to increase protection must be included in this consideration. Finally, it may be that a small change in the value of the OEL would contribute to a significant change in worker protection – that seems to be the more relevant concern. **We would recommend the following:**

*A change in the value of a recommended exposure level from one or more state or national governments, from any private independent national or international organizations, generally recognized as utilizing rigorous scientific processes to establish recommended exposure levels that could contribute to a significant increase in the protection of workers with respect to serious chronic health outcomes.*

3. The degree to which exposure to the substance in California is, or may become, widespread and potentially hazardous.

**COMMENT:** We agree with this as a consideration for setting priorities, but wonder where you will get this information when the Governor vetoed legislation AB 816 that would have permitted the Department of Health Services to obtain this very information on chemical usage (which was not, when they asked, provided voluntarily) for the substances that are at issue. **It is important to include in the P&P some guidance for how you will obtain this information.**

4. The seriousness of the hazard presented by the substance. For example a substance with apparent potential for cancer or reproductive effects would generally lead to that substance receiving a higher priority for consideration than a substance where the major hazard potential was mild respiratory irritation.

**COMMENT:** We agree.

It is anticipated that some substances of relatively low priority may be considered by the committee, and possibly included in a proposal to the Standards Board, along with others of higher priority in order to manage the workload of the PEL Advisory Committee and Division staff.

**COMMENT:** IT MAKES NO SENSE to say that low priority substances should help manage workload. Every substance adds to the workload to some degree. If the substance is really low priority, then it should not be addressed. It appears there is a desire to be able to assert that something has been changed, even if that something is meaningless.

## II. ROLE AND SELECTION OF THE TECHNICAL EXPERT ADVISORY COMMITTEE

### A. Role of TEAC

**COMMENT:** See the general comments made at the outset of this letter.

### B. Selection of TEAC

**COMMENT:** We would suggest the following:

The Division shall seek technical scientific experts from other state agencies, academic institutions, professional associations, ~~industry and employer associations, unions and other labor organizations,~~ and other interested groups.

We strenuously object to the Division seeking representatives from industry and employer associations or unions and other labor organizations. We do not object to individuals from those categories being members of the TEAC. However, it is imperative that you assure that those on the TEAC do not sit as representatives of the communities but as unbiased scientists. We strongly urge you to add the language we offered in our earlier comments:

*Technical experts shall not be precluded because they also represent the affected industry(s) or employee(s), but all TEAC members should act as independent neutrals while performing committee functions. TEAC members shall recuse themselves from considering substances if there is an apparent conflict and they cannot function as a neutral.*

#### 1. Areas of expertise

**COMMENT:** We reiterate our previous comments 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 and if s/he had expertise in quantitative risk assessment as demonstrated by training and/or relevant work experience.

The P&P still does not state that TEAC members should have demonstrated, specific expertise in quantitative risk assessment. This is as important as the “degrees” that the expert holds.

The P&P still does not state that TEAC members expertise should be demonstrated by training and/or relevant work experience. Again, the “degree” is not the key element, but rather actual training and work experience is key to the qualifications.

#### 2. Size of committee

**COMMENT:** We agree with the concepts.

#### 3. Process to select members

c. Recommendations of interested parties, including labor, trade and employer organizations, who ~~wish to have their perspectives included in the committee's deliberations but~~ recognize that members serve as impartial experts evaluating scientific studies and not as representatives of particular interests.

**COMMENT:** As we stated above and in our earlier comments, it is **COMPLETELY INAPPROPRIATE** to view anyone as a representative of a particular interest. Nor is it appropriate for a group to have a TEAC member represent their interests or perspectives.

d. **COMMENT:** We suggest that a subdivision d. be added that requires TEAC members sign a conflict of interest statement.

**OVERALL COMMENT:** In this section the Division notes that members will be asked to serve a minimum of 2 years and attend meetings every other month. The more onerous the workload, the less likely there will be worker volunteers, who are not paid while attending these meetings. These requirements are extreme because the Division is using a volunteer TEAC in lieu of staff. See our comments on page 1 of this letter.

### C. Staff participation

**COMMENT:** Please refer to earlier statements regarding staffing the TEAC.

## III. ROLE AND SELECTION OF FEASIBILITY ADVISORY COMMITTEE

**COMMENT:** Please see our general comments at the beginning of this letter. We vehemently oppose this entire process.

## IV. ADDITIONAL ADVISORY COMMITTEE PROCESS ISSUES

A. **Public notice and interested party involvement.** We previously suggested the P&P establish tight criteria for presentations made to the committee by various interested parties. The language in this P&P is still weak and we believe the P&P should include the following statement:

In the past some interested parties have requested to make presentations to the committee relevant to the process of recommending a PEL. Such presentations will be allowed to the extent they are respectful of the committee's limited time and voluntary status, and that they are factual and provide references for assertions that can be shared publicly. *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.
2. Web posting of notices and meeting materials.

B. **Committee consideration of relevant science and feasibility documents.**

**COMMENT:** We strenuously object again to the statement that the goal of the committee in making a PEL recommendation is to strive for a consensus that can be justified scientifically. Rather, 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.

We also strongly request that the paragraph concerning cost and feasibility considerations be stricken. Facts regarding feasibility should be forwarded to the Board for their consideration, but **OPINIONS of committee members have little value in this process unless they are backed up with scientific evidence.**

**We recommended the following:**

Generally preference will be given in the committee's deliberations to evaluations of peer reviewed articles prepared by federal or California state government agencies and/or published in recognized scientific journals. Great weight shall be given to OEHHA's toxicological and scientific assessments when such exist for a substance under consideration with respect to a chronic illnesses such as cancer, reproductive or development harm, asthma or other illnesses that result from sensitization. Consideration may be given to presentations by interested parties and non-published reports where the committee believes they are sufficiently well documented; however, these unpublished studies must be verified and evaluated by a professional organization independent of the industry or industry association that produced the material. Relevant documents and briefing summaries shall be provided by Division staff .... ~~The committee in making a PEL recommendation will strive for a consensus that can be justified scientifically, to protect California workers exposed to the substance over a working lifetime.~~

C. Supplemental need to consider cost, feasibility or California unique issues

**COMMENT:** 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.

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

Sincerely,

Fran Schreiber, Acting Executive Director