

December 22, 2011

TO: Ellen Widess, Chief, Division of Occupational Safety and Health

FROM: American Composites Manufacturers Association  
American Chemistry Council  
Associated General Contractors of California  
BIOCOMM  
California Chamber of Commerce  
California Construction and Industrial Materials Association  
California Cotton Ginners Association  
California Cotton Growers Association  
California Framing Contractors Association  
California Healthcare Institute  
California League of Food Processors  
California Manufacturers and Technology Association  
California Metals Association  
California Professional Association of Specialty Contractors  
CIEC, California Ironworker Employer Council  
Nisei Farmers League  
Residential Contractors Association  
Styrene Information & Research Center  
Western Agricultural Processors Association  
Western Plant Health Association  
Western States Petroleum Association  
Western Steel Council

SUBJECT: **POSSIBLE CHANGES TO THE PEL PROCESS**

Based on discussions heard at the December 8 meeting of the Health Experts Advisory Committee (HEAC), the above organizations are concerned about proposed but unspecified changes to the process for developing permissible exposure limits (PELs) for workers. Proposed changes could put the Division on a new course making the PEL process less open and less responsive to interested parties. The contentious history of this issue and the omission of written details about proposed changes are reasons for concern. How can we expect the PEL process to remain open and transparent when the process for changing the process is significantly closed and veiled?

The current Policy and Procedure (P&P) document for setting PELs was developed between December 2005 and March 2007 using three advisory meetings and four drafts circulated for comment. Labor, management, and all related professions were well represented at those meetings. Thousands of valuable hours were invested in scrutinizing and refining that document. That process for developing the P&P was a shining example of transparency and

participation. The process for changing the PEL process should be equally open and deliberate so that interested persons can ensure an open and deliberate process for setting PELs.

At the December 8 HEAC meeting, the Division gave interested parties 30 days to submit comments, after which the Division would announce the changes to the PEL process. The Division rejected a suggestion that it provide details in the form of revisions to the existing P&P document. The Division's approach deprives the regulated community of an opportunity to comment on the details and deprives the Division of their expertise on such matters. That approach is prone to unintended and unnecessary consequences.

As you well know, the PEL process has been a source of contentious debate. It began in 2005 when the Division proposed several controversial PELs to the Standards Board based on advice from the former Airborne Contaminants Advisory Committee. The following storm triggered a year-long review and reformation of the PEL advisory process. Policy and procedure changes now could easily recreate the circumstances that stopped the PEL process "dead in its tracks" for nearly two years while the problems were ironed out in fine detail.

The information so far provided by the Division is inadequate to assess the impact of possible changes. The meeting announcement said only, "This will be an opportunity to discuss what approaches to the [PEL] Project have been most effective and what might be changed to enhance the efficiency of development of PEL recommendations." At the meeting, the Division introduced this topic and asked for comment. When asked what it had in mind, the Division provided only hints. The first were two goals: 1) maximize help from sister agencies and 2) shift work from HEAC committee members to DOSH staff. The Division said nothing as to how the first goal would be accomplished. As to the second goal, it proposed to start the advisory process with a "two pager" from staff to be reviewed by the HEAC.

The limited information provided at the meeting raised more questions than it answered. For example, will the "two pager" include a recommended PEL? That would be a dramatic change in procedure. The current process begins with recommendations from the HEAC, then the FAC (Feasibility Advisory Committee). The Division formulates its opinion after the advice, not before. Reversing that process would put the Division in a predictable mode of defending, rather than formulating, its opinion during the advisory process.

For another example, how will the help from sister agencies be maximized? The current process leaves an open door to any and all data and advice from sister agencies. The proponents of reform legislation (AB 815 in the 2005-06 session, AB 515 in the 2007-08 session, and AB 553 in the 2011-12 session) have advocated a transfer of judgment from DOSH to sister agencies, relying on their expertise rather than the independent judgment of DOSH staff to recommend PELs to the Standards Board. Is this what DOSH proposes? If so, it would impose a significant barrier between the real decision makers and those who rely on the PEL advisory process for meaningful input regarding PELs. It would also abandon the Division's mandate from the Standards Board to propose the PELs and ensure they meet the standards for occupational limits as opposed to the standards for other regulatory schemes.

The exact motives for change are also unclear. The Division cited scarce resources as a motive for change, but did not specify any changes that would solve this problem. The proposed shift of burden from HEAC committee members to DOSH staff doesn't solve that problem. A shift of burden from the Division to sister agencies only hides the problem and ignores the fact that sister agencies have resourced the PEL process all along in advisory roles established by memoranda of understanding between the agencies.

The Division also cited complaints about the speed of setting PELs as a motive for change, but admitted that shifting burden from the HEAC to the Division does nothing to speed up the process. Interested parties were quick to note that Cal/OSHA leads the nation in setting PELs and that "substances per year" is a misleading measure of progress. The new PEL process implemented in 2007 represented a shift from more-or-less wholesale adoption of Threshold Limit Values published by the American Conference of Governmental Industrial Hygienists to a prioritized focus on the substances that matter most in California. This naturally involves more interested parties, weightier consequences, and more controversy per substance. It also generates a much bigger impact on worker health in California.

The Division also cited "feedback" from past committee members who, strangely, were not present to specify their concerns. We learned only that the Division wants to entice them back onto the HEAC by reducing the burden on HEAC members. We are concerned that the details of how that is done may reduce the role of the HEAC as well as its burden. Current members who were present offered ways to reduce the HEAC burden without also reducing its role.

The only apparent means of reducing Division burden and speeding up the process is to gut the process of meaningful, independent review by the Division and the HEAC. This was the essence of legislative proposals between 2005 and 2011 that did not pass out of the Legislature. We believe the Legislature has so far rejected these reforms because it wants the Division to exercise independent judgment after a thorough consideration of advice from health experts and the regulated community, as well as sister agencies, the way it is done in the current process.

New PELs can have a significant impact on the viability of doing business in California. A robust advisory process that is open and responsive to the regulated community may prevent unnecessary and unintended barriers to economic activity and jobs. Hence, we are keenly interested in the details of California's PEL setting process.

Thank you.

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