

State of California
Department of Industrial Relations
Memorandum

To : ALL STANDARDS BOARD MEMBERS

Date : March 6, 2013

From : **Division of Safety and Health**
Ellen Widess, Chief

Subject : **Federal Final Rule, Globally Harmonized System update to Hazard Communication (Health Standards)**

At the November 15, 2012, Public Hearing, the Occupational Safety and Health Standards Board (Board) considered revisions to California Code of Regulations, Title 8, General Industry Safety Orders, Section 5194, Hazard Communication and several other related health standards in Title 8. The revisions proposed to these standards are substantially the same as the equivalent federal standard, with certain exceptions explained below.

Labor Code Section 142.3(a)(3) exempts the Board from providing a comment period when adopting a standard substantially the same as a federal standard. However, as indicated in the Notice and Informative Digest, the Board still provided a comment period regarding the following areas: 1) identify any issues unique to California related to this proposal which should be addressed in a subsequent rulemaking and 2) solicit comments on the proposed effective date.

As a result of public comments and/or staff evaluation, two modifications to the proposal have been made to ensure that the proposal remains as effective as the Federal final rule without reducing current protections of the existing state standards. The Division asserts that the Horcher rulemaking process in Labor Code Section 142.3(a)(3) cannot be used when the federal standard would weaken protections in existing state standards (Labor Code Section 142.3(a)(4)(B)).¹ However, as a result of the public and Board member comment, the Division will convene an advisory committee in April 2013, on the issues raised about the state standard deviating from federal language where the new federal provisions could reduce the protectiveness of California's standard.

Also, as a result of new federal corrections published in the Federal Register on February 8, 2013 (Fed Reg 78: 9311-9315), additional modifications have been made.

SUMMARY OF WRITTEN AND ORAL COMMENTS

I. Written Comments

Mr. John McCullough, Assistant Vice President, Wells Fargo, by letter dated October 10, 2012

¹ For a detailed discussion of the Division's view of the application of the Horcher process to this rulemaking, see attached Memorandum dated January 28, 2013 from Suzanne Marria, Special Counsel, DOSH, to Ellen Widess, Chief, DOSH.

Comment:

Mr. McCullough recommended posting the side-by-side online for the public to see where the state standard deviates from the federal standard. One inconsistency with the state standard and the federal standard is in Section 5194(d) where the federal language deleted subsections (d)(3) – (5).

Response:

The existing language retained in Section 5194(d)(3) – (5) is more protective than the new federal language. The Board chooses to retain the more-protective State wording at this time. The changes the commenter recommends must be considered later in a follow up regular rulemaking process. The Division anticipates using an advisory process in April 2013 to consider developing a follow up rulemaking proposal to address Mr. McCullough's and other recommended changes.

The Board thanks Mr. McCullough for his comments and participation in the Board's rulemaking process.

Mr. Joe Moulton, Manager, Du-All Safety, by email dated October 22, 2012

Comment:

Mr. Moulton recommended that an annual refresher requirement be added to Section 5194(h) to bring it in line with many local environmental health regulations for building plans and shipping of hazardous materials.

Response:

The comment is beyond the scope of this rulemaking process but may be raised in the context of the advisory meeting for a possible non-Horcher rulemaking.

The Board thanks Mr. Moulton for his comments and participation in the Board's rulemaking process.

Ms. Elizabeth Treanor, Director, Phylmar Regulatory Roundtable, by letter dated November 6, 2012

Comment:

Ms. Treanor expressed concern that Section 5194(d) deviates from the federal language. The proposal should not retain the existing language about one positive study nor the subsections referencing lists of substances. Section 5194(f) should not retain the current three month deadline for revisions. The commenter also made suggestions on how to assist employers while the new requirements phase in.

Response:

California's Hazard Communications Standard (currently 8 CCR 5194) predates and has an independent origin from the federal Hazard Communications Standard. In 1980, in part responding to incidents in which the manufacturer failed to provide information it had regarding

health hazards such as reproductive harm associated with dibromochloropropane (DBCP), the California Legislature passed the Hazardous Substances Information and Training Act (Labor Code §§ 6360-6399.7; Stats. 1980, ch. 84, § 1.). An implementing regulation was promulgated in 1981, which was amended after the federal standard was adopted to make it as effective as, although not identical to, the federal standard.² California's Labor Code Sections 6360-6399.7, differ in some ways from the federal standard. California's standard also contains requirements implementing sections of the Health and Safety Code.

The existing language retained in subsections 5194(d) and (f) is more protective than the new federal language. In regards to the "one positive study," the current California standard defines a health hazard as a substance 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. Under the changes proposed in this rulemaking, the material safety data sheet (MSDS), now to be called the safety data sheet (SDS), preparer must then, as with the new federal standard, classify that hazard in accordance with the weight of evidence approach described in Appendix A.

The regulation as currently proposed, therefore, would ensure that hazardous chemicals at least enter into a documented classification process. This is more effective than the change adopted by federal OSHA because it does not permit a manufacturer or distributor to avoid classifying substances because the SDS preparer decides, prior to classification, that based on "weight of evidence" the substance need not even be evaluated. The Board does not choose to weaken the existing State standard by way of this Horcher rulemaking.

The existing language in subsection (d)(2) requires that "evidence which is statistically significant and which is based on at least one positive study conducted in accordance with established scientific principles is considered to be sufficient to establish a hazardous effect if the results of the study meet the definitions of health hazards in this section." This neither precludes nor prevents the "weight of evidence" approach to *classifying* health hazards as described in the federal Appendix A (proposed to be adopted by the Board). It states "both positive and negative results are considered together in the weight of evidence determination. However, a single positive study performed according to good scientific principles and with statistically and biologically significant positive results may justify classification."

Under the procedures adopted by federal OSHA in amending 29 CFR 1910.1200, a manufacturer or importer who classifies a substance based on a hazardous effect may determine, based on the weight of evidence, that the hazards of the substance:

(1) meet the criteria of one or more categories of hazard, and appropriately classify that substance, or

² Section 5194, Tit. 8, Cal. Code Regs. filed 12/9/1981 to become effective in 180 days. (CA Notice Register 81, No. 50.)

- (2) do not meet the criteria of one or more categories of hazard, and therefore not classify the substance even though it may have a hazardous effect,³ or
- (3) meet the criteria for a hazard not otherwise classified or
- (4) must be “noted” on the safety data sheet because there is one positive study regarding carcinogenicity.

Because the wording in the federal standard can be interpreted to allow a manufacturer or importer to decline to classify a chemical based on the manufacturer’s or importer’s conclusions about the weight of the evidence, the Board has decided not to replace the existing language on this matter through the Horcher process in this rulemaking. For these reasons, the Board does not believe the language retained in subsection (d) is in conflict with proposed Appendix A. However, there will be further discussion regarding the relationship between Appendix A and subsection (d) during the advisory process described above.

In regards to the time frame for including substantial changes in labels (subsection (f)) the existing maximum period for required updates to labels under the California standard is three months. This is the same timeframe for required updates to SDS. By continuing this practice per the existing California standard, in order to ensure the known chemical hazard information is available to employers and employees exposed to the chemical at work, California workplaces will continue to remain more protective. The Division is not aware of sufficient justification to introduce an additional three month delay in providing timely label information that employers, employees, and medical providers need. However, the Division anticipates using an advisory process beginning in April 2013, to consider developing a follow up rulemaking proposal to address Ms. Treanor’s recommended changes, and additional information may be gathered during that process. Ms. Treanor’s procedural suggestions regarding keeping the current standard posted on the website while the new requirements phase in, expediting the safety proposal, and outreach are beyond the scope of this rulemaking, and will be considered at a later date.

The Board thanks Ms. Treanor for her comments and participation in the Board’s rulemaking process.

Mr. Bill Taylor, Representative, Public Agency Safety Management Association, by letter dated November 9, 2012

Comment:

Mr. Taylor expressed concern that the new system is not aligned with the current National Fire Protection Association (NFPA) and Hazardous Materials Identification System. Federal OSHA should have coordinated with NFPA before implementing GHS.

³ For example, a substance that is hazardous because it causes eye irritation, but the degree of irritation is below the triggering levels in Appendix A, would not be classified.

Response:

The comment is beyond the scope of this rulemaking process. However, for background information related to his comment, Mr. Taylor should refer to the federal final rule preamble which says that other agencies including NFPA will be addressing GHS in the future. The Board thanks Mr. Taylor for his comments and participation in the Board's rulemaking process.

Mr. Daniel Leacox, Director, Greenberg Traurig representing a GHS coalition of employers, by memorandum dated November 9, 2012

Comment:

The GHS coalition recommends that the proposal not deviate from the federal language in Section 5194(c), (d) and (f). The definition of health hazard in both Section 5194 and 5192 should not retain the requirement for one study. The definition for hazardous chemical should not include combustible liquid or water-reactive. The lists and language about concentrations under one percent should not be retained in subsection (d)(3-5). Subsection (f)(11) should change the three month timeframe to the new federal timeframe of six months.

Response:

The current proposal in this Horcher process adopts most portions of the applicable new federal language while ensuring the newly adopted language is as effective as the existing California language on the issue. The existing language retained in Sections 5194(c), (d) and (f) is more protective than the new federal language that the commenter wants to replace. The Board chooses not to weaken the existing State standard by way of this Horcher rulemaking. The Division anticipates using an advisory process beginning in April 2013, to consider developing a follow up rulemaking proposal to address the recommended changes. For further discussion, see response to Ms. Treanor, above.

Additionally, Mr. Leacox stated that the proposal improperly changed the definition of "hazardous substance" (now "hazardous chemical") by directly incorporating into that definition water-reactive chemicals and combustible liquids. The federal regulation had omitted those specific categories from the definition of physical hazard, and adoption of that federal change would have made the standard less effective than California's existing standard. The Board concurs with Mr. Leacox to the extent that it believes that those categories should be added not to the definition of hazardous chemical, but to the definition of physical hazard, and therefore the proposal has been altered to reflect the following definitions of hazardous chemical and physical hazard:

Hazardous chemical.

Any chemical which is classified as a physical hazard or a health hazard, a simple asphyxiant, combustible dust, ~~combustible liquid, water-reactive,~~ pyrophoric gas, ~~or a~~ hazard not otherwise classified.

~~Hazardous substance.~~

~~Any substance which is a physical hazard or a health hazard or is included in the List of Hazardous Substances prepared by the Director pursuant to Labor Code section 6382.~~

Physical hazard.

~~A substance for which there is scientifically valid evidence that it is a combustible liquid, a compressed gas, explosive, flammable, an organic peroxide, an oxidizer, pyrophoric, unstable (reactive) or water reactive.~~ A chemical that is classified as posing one of the following hazardous effects: explosive; flammable (gases, aerosols, liquids, or solids); oxidizer (liquid, solid or gas); self-reactive; pyrophoric (liquid or solid); self-heating; organic peroxide; corrosive to metal; gas under pressure; **combustible liquid; water-reactive;** or in contact with water emits flammable gas. See Appendix B to section 5194 -- Physical Hazard Criteria.

The Board believes that it is necessary to continue to specifically include those two categories of physical hazards in the definition section to ensure that these physical hazards are also evaluated, and communicated.

The Board thanks Mr. Leacox and the GHS coalition of employers for their comments and participation in the Board's rulemaking process.

Mr. Michael Herges, Safety & Health Services Manager, Granite Rock Company, by email dated November 14, 2012

Comment:

Mr. Herges expressed agreement with the November 9th GHS coalition comments.

Response:

See the above response to the written comments submitted by Mr. Leacox representing the GHS coalition of employers.

The Board thanks Mr. Herges for his comments and participation in the Board's rulemaking process.

Mr. David Shiraishi, Area Director, U.S. Department of Labor, Occupational Safety and Health Administration, by letter dated November 14, 2012

Comment:

Mr. Shiraishi stated the proposal is not commensurate with the federal standards with regard to the health hazards definition.

Response:

The Board acknowledges Federal OSHA's opinion regarding the proposal and will address the health hazard definition differences in an advisory meeting in April 2013. This meeting will consider a possible follow up rulemaking proposal to address federal changes not incorporated into this proposal.

The Board thanks Mr. Shiraishi for his comments and participation in the Board's rulemaking process.

Dr. Mike Wilson, Director, UC Berkeley Labor Occupational Health Program, by letter dated November 14, 2012

Comment:

Dr. Wilson states the standard should not be weakened by implementing the GHS and urges the Board to retain the Section 5194 health hazard definition as proposed. The one significant study language should be retained to inform California businesses and workers of that one finding even if a weight of evidence approach discounts that study.

Response:

The Board thanks Dr. Wilson for his support of the existing California health hazard definition and retention of the one significant study language. As stated above in the response to Ms. Treanor's comment the Board shall retain that language as it is more protective and the Division will hold an advisory meeting in April 2013, to consider a possible follow up rulemaking proposal.

The Board appreciates Dr. Wilson's comments and participation in the Board's rulemaking process.

Ms. Marie Martinko, Director, Society of Plastics Industry, by letter dated November 15, 2012

Comment:

Ms. Martinko expressed concern that Section 5194(d) deviates from the federal language. The proposal should not retain the existing language about one positive study nor the subsections referencing lists of substances. The definition of health hazard in Section 5192 and Section 5194(c) should not deviate from the federal language regarding one positive study. Section 5189 deviates in scope of what is covered based on the changes in definition of flammable and the proposal should use the federal language.

Response:

See the response to Ms. Treanor and Mr. Leacox regarding the comments on Section 5192 and Section 5194(c) and (d). The reference to the "Director's List of Hazardous Substances" reflects the requirements of California's Labor Code. Regarding Section 5189, the state proposed changes are verbatim from the federal language and no change in scope is proposed.

The Board thanks Ms. Martinko for her comments and participation in the Board's rulemaking process.

II. Oral Comments

Oral comments received at the November 15, 2012, Public Hearing in Sacramento, California.

Comment:

Marti Fisher, California Chamber of Commerce, stated that the language in the proposal is not the same as the language in the federal GHS proposal and, therefore, should not be done through the Horcher process. She also stated that if this proposal is adopted, it will make California different from the rest of the world, which would not be good for business in California and would be contrary to the goal of global harmonization. She urged the Board to either revise the language to make it identical to the federal proposal and then continue with the Horcher process or continue through the normal rulemaking process to adopt the significant differences to the federal standard.

Response:

See the response to the similar written comments from Ms. Treanor and Mr. Leacox. Section 142.3(a)(3) and (a)(4) permit the Horcher process to be used for all or a portion of a federal standard. This proposal adopts the vast majority of the federal language. The Board believes it is necessary to act on this proposal as soon as possible so that California employers can begin to act on the training requirements effective December 1, 2013. This is the first deadline in the federal rule.

The Board thanks Ms. Fisher for her comments and participation in the Board's rulemaking process.

Comment:

Dan Leacox, Greenberg Traurig, stated that the adopted federal GHS rule contains substantial differences that negatively impact this rulemaking in three ways: it defeats the purpose of the rule regarding conformance with the United Nations GHS updates, it has a negative impact on the adoption procedure, and it lacks the rationale needed to justify the substantial differences between it and the federal standard. He also stated that this proposal affects or changes several of the classification criteria listed in the federal standard, which leads to differences in safety data sheets required by the hazard communication standard. There are also portions where substantial differences occur because the proposal omits certain language listed in the 2012 federal standard or retains existing state language that was deleted from the 1994 federal standard.

Mr. Leacox reviewed the side by side with the Board, discussing the highlighted sections in further detail. He stated that in order to achieve the purpose of the rule, all substantial differences between the federal standard and this proposal must be identified and eliminated. If the Board desires to retain some of the proposed differences, he believes that they should be deferred to future rulemakings like it has been done with other federal updates.

Response:

See the response to the similar written comments from Mr. Leacox.

The Board thanks Mr. Leacox for his comments and participation in the Board's rulemaking process.

Comment:

Nicole Rice, California Manufacturers and Technology Association, concurred with Mr. Leacox regarding the inconsistencies between the federal GHS standard and the proposal. She stated that these differences could hinder California's global competitiveness in this area. She urged the Board to make this proposal more similar to the federal standard or move the inconsistencies into the full rulemaking process so that they can be fully vetted.

Response:

See the response to the similar written comments from Mr. Leacox. The purpose of the federal rule, as stated, is to ensure the *hazards* of all chemicals being produced or imported are *classified* and that *the information concerning classified hazards* is transmitted to employers and employees. California employers are currently complying with the requirements of the California Hazard Communication Standard as set out in Title 8 of the California Code of Regulations. California's global competitiveness has kept it among the top 8 economies in the world.

The Board thanks Ms. Rice for her comments and participation in the Board's rulemaking process.

Comment:

Bill Taylor, PASMA – South Chapter, asked to clarify some concerns regarding this proposal. He stated that there is a difference in labeling between the NFPA standard and the federal standard that needs to be addressed because it will cause confusion regarding what is considered to be the most hazardous and the least hazardous.

Response:

See the response to the similar written comments from Mr. Taylor.

The Board thanks Mr. Taylor for his comments and participation in the Board's rulemaking process.

Comment:

Mitch Seaman, California Labor Federation, concurred with the Division's statement regarding this proposal. He said that elements that would weaken the state standard, specifically the study requirement and the amount of time in which the safety data sheets would need to be changed, should go through the standard rulemaking process instead of the Horcher process.

Response:

The Board appreciates Mr. Seaman's support of the proposal and the Division's intent to deal with state unique issues and the federal language concerns brought up during this rulemaking in a follow up advisory process.

The Board thanks Mr. Seaman for his comments and participation in the Board's rulemaking process.

Comment:

Jeremy Smith, State Building Construction Trades Council, concurred with Mr. Seaman's comments and supported the plan to carve out the areas in this proposal that need further discussion or separate rulemakings and move the rest through the Horcher process. He said that the California regulation supersedes the federal regulation in this case.

Response:

The Board appreciates Mr. Smith's support of the proposal and the Division's intent to deal with state unique issues and the federal language concerns brought up during this rulemaking in a follow up advisory process.

The Board thanks Mr. Smith for his comments and participation in the Board's rulemaking process.

Comment:

Bruce Wick, CALPASC, spoke on behalf of CALPASC and several clients of Kevin Bland. He concurred with Mr. Leacox's comments. He asked the Board to consider the small businesses in California and the difficulty that they have had in complying with the federal GHS standard since the beginning. He stated that this could be an opportunity for California to upgrade and join an international movement on this very important issue.

Response:

Small employers in California are currently complying with the existing California Hazard Communication Standard requirements under Title 8. See the response to the similar written comments from Mr. Leacox.

The Board thanks Mr. Wick for his comments and participation in the Board's rulemaking process.

Comment:

Charley Rea, CALCIMA, concurred with the concerns expressed by Mr. Leacox and the California Chamber of Commerce regarding the inconsistencies between the proposed state standard and the federal standard, encouraging the Board to have sufficient deliberations on this matter.

Response:

See the response to the similar written comments from Mr. Leacox.

The Board thanks Mr. Rea for his comments and participation in the Board's rulemaking process.

Comment:

Mike Herges, Granite Rock, concurred with the coalition letter and urged the Board to adopt a GHS standard that is more in line with the federal standard. He stated that the inconsistencies between the proposed state standard and the federal standard are significant and that if California

takes a different approach to GHS than that of the federal standard, it will not be in harmony with the global system and will make it difficult for safety people to comply with the federal standard.

Response:

The safety people for California employers who Mr. Herges is referring to currently are complying with the existing California Hazard Communication Standard. This proposed Horcher rulemaking involves adopting language that is the same as the federal language. The issue of addressing the existing California HCS language that is different than the newly adopted federal language will be addressed at the April advisory committee meeting but cannot be adopted under the Horcher process due to the California Labor Code. See the response to the similar written comments from Mr. Leacox.

The Board thanks Mr. Herges for his comments and participation in the Board's rulemaking process.

Comment:

Eric Rozance, Phylmar Regulatory Roundtable, sent in written comments to the Board along with a GHS training pamphlet that they created. He stated that he is concerned about the parts of the proposal that deviate from the federal standard, especially subsections (d)(2), (d)(3), and (d)(5) of Section 5194 regarding hazard classifications. He asked the Board to use the same classification language that federal OSHA uses and to replace all of Section 5194(d) with the current federal language. He also asked the Board to adopt the same 6-month timeframe that the federal standard has for revising labels instead of the 3-month timeframe listed in the proposed standard. Mr. Rozance recommended that the Board make both the existing version and the proposed version of the GHS standard readily available online to employers until the new standard becomes enforceable. He also recommended that Cal/OSHA engage in outreach with the business community and workers to explain the new requirements and compliance deadlines for GHS, as well as the areas where the new standard deviates from the federal standard and the old standard.

Response:

See the response to the similar written comments from Ms. Treanor.

The Board thanks Mr. Rozance for his comments and participation in the Board's rulemaking process.

Comment:

John Caldwell, American Chemistry Council, concurred with the concerns expressed in the coalition letter and by Ms. Fisher and Mr. Leacox.

Response:

See the response to the similar written comments from Mr. Leacox.

The Board thanks Mr. Caldwell for his comments and participation in the Board's rulemaking process.

Comment:

Steven Johnson, Associated Roofing Contractors of the Bay Area Counties, concurred with the comments made in the coalition letter. He stated that manufacturers in his group struggle to comply with the California GHS standard as it is currently written and that the lack of clarity and consistency with the language in the federal standard could be harmful. He stated that he supports making this proposal clearer and more consistent with the federal standard and expressed interest in being involved with this process as it moves forward.

Response:

See the response to the similar written comments from Mr. Leacox.

The Board thanks Mr. Johnson for his comments and participation in the Board's rulemaking process.

Comment:

Kate Smiley, Association of General Contractors of California, stated that this proposal should not be a Horcher because it differs from the federal standard. She concurred with the statements made by Mr. Wick and Mr. Johnson and encouraged the Board to make it easier to understand and apply so that workers can be protected.

Response:

See the response to the similar written comments from Mr. Leacox.

The Board thanks Ms. Smiley for her comments and participation in the Board's rulemaking process.

Comment:

Terry Thedell, Sempra Energy, stated that he would like to see clarity in the training requirements portion of the proposed standard as soon as possible so that businesses can have enough time before the December 1, 2013, deadline to get this done.

Response:

The Board agrees that it is important to use the Horcher process to facilitate adoption of federal provisions that are at least as effective as the existing California standard. The training requirements are proposed to be directly adopted. This will provide employers time to comply with the December 1, 2013, deadline for training on new label elements and safety data sheet format, and will maintain California as effective as federal regulations.

The Board thanks Mr. Thedell for his comments and participation in the Board's rulemaking process.

Comment:

Dorothy Wigmore, Worksafe, stated that federal OSHA has changed their standard to include a version of the GHS standard, but not all of it. She also stated that the Horcher process recognizes the need to retain items that are more effective than the federal regulations and that the Board cannot adopt any part of a federal regulation that is less protective than an existing California standard. She stated that she does not understand why the federal GHS labeling requirement is 6 months instead of 3 months when it comes to informing workers about being harmed. She stated that this is not good for workers or for businesses whose workers may be getting sick because they do not know about the hazards. Ms. Wigmore also stated that there are going to be differences to deal with and that California has demonstrated where it can be more protective and that this difference should be retained.

Response:

The Board appreciates Ms. Wigmore's support of the proposal and the Division's intent to deal with state unique issues and the federal language concerns brought up during this rulemaking in a follow up advisory process.

The Board thanks Ms. Wigmore for her comments and participation in the Board's rulemaking process.

Questions and comments from the Board:

Mr. McDermott stated that this is a complex issue as noted by the Division and Mr. Leacox. He said that if there were issues with the federal standard, then they should have been brought to federal OSHA when they were making decisions on that standard, and because the issues were not brought up at that time, Federal OSHA followed its beliefs on that part. He also cautioned the Board about laying extra requirements on labels and safety data sheets that are being prepared globally for products being sent to California. He said that it is not practical to think that both the GHS standard and California's standard will be incorporated when safety data sheets are prepared. Mr. McDermott suggested that the Board adopt the federal standard as it is written and then adopt a separate standard with requirements specific to California, and when creating the separate standard consult the Labor Code, Cal/OSHA standard, and other sources to decide what is needed.

Mr. Harrison stated that if the Board does what Mr. McDermott recommended and adopts the federal standard, he is concerned about the timeframe for creating and adopting the separate standard and what to do in the interim because there are some portions of the federal standard that are less stringent than the existing California standard, which conflicts with the Labor Code.

Ms. Stock pointed out that the Labor Code states that items providing less protection than the existing standard cannot be Horchered. Mr. Donlon earlier made a similar statement to the effect that the state may not adopt a federal standard that is less protective than an existing state standard. Ms. Stock also said that it makes sense to her to pull out the sections in the proposed standard that differ from the federal standard or need further discussion and subject them to the

standard public hearing procedures while moving the rest of the proposal forward and adopting it. She stated that one area of the proposed standard that she would like to see further discussion on is regarding one study versus the weight of the evidence. She stated that there will be a lot of public health implications and opinions regarding that provision. She asked whether the Division or Board staff have isolated the information somewhere for the Board to see what areas of the proposed standard will be pulled out or if that is something that needs to be discussed right now.

Mr. Donlon responded by stating that the proposed standard that is currently in front of the Board is what the Division is asking the Board to adopt at this time. He stated that if the proposed standard is adopted by the Board, portions of it can be changed through the advisory committee, rulemaking and APA processes. He also stated that sections have been pulled out to go through the regular rulemaking process.

Ms. Stock asked Mr. Donlon if the reason why some of the items are not the same as the federal standard is because those items were not as effective in the federal standard as they are in the proposed. Mr. Donlon stated that some things in the existing California standard were left in where the Division felt that the federal standard is less effective.

Ms. Smisko asked about the timeline that is available to act on this proposed standard and asked if there are any federal deadlines that must be met. Ms. Hart stated that it will depend on the Division's response to today's comments and whether or not they decide to pull out the parts of the proposed standard that can be Horchered. She stated that the other parts will still need to be addressed, and since the Division only has until December 1, 2013, to address some of those parts, they would need to move on them quickly. The other parts have deadlines in 2014 and 2015. Mr. Donlon added that some of the things in the proposed standard that conflict with the federal standard would need to be worked out before the December 1, 2013, deadline because that is the deadline for training and some of those differences would need to be worked out before training can begin.

Mr. Thomas stated that items that are different and stronger in the proposed standard need to be identified and passed, and the other items that are argumentative or conflicting need to be worked on further. He stated that he does not want anyone to guess or not know what the standard is regarding certain chemicals.

Ms. Smisko asked for clarification as to whether or not the Board wants to adopt the federal language as it is or just the parts that are exactly the same and then further discuss the other parts. Ms. Stock stated that the Board is not able to adopt something through the Horcher process that is less effective than the current standard; so they cannot adopt the entire federal standard as it is written. She suggested that the Board adopt the parts of the federal standard that are identical to the proposed standard and then work out the other areas in an expedited fashion because of the timing. Mr. McDermott suggested that the Board adopt the whole federal standard and then add a subsection under it that lists the differences to the standard.

Mr. Thomas and Mr. Jackson asked Mr. Beales to comment on what the Board should do. He explained the two rulemaking processes that the Board has at its disposal. He stated that there are three legal concerns regarding this proposal that the Board should consider: internal consistency, the Horcher process, and retaining items. He stated that the proposal should embody clarity, and if one part of the proposal contradicts another part of the proposal, or is ambiguous, then it does not meet the clarity standard and should be addressed. He explained that the Horcher process takes the words of the federal regulation and sticks them into the state regulation, and if things are added that are not part of the federal language, that cannot be done through the Horcher process. Regarding retaining items, items can be retained, and the proposal before the Board is what is crossed out or underlined, not what stays the same.

Mr. Beales opined that the Labor Code section that underlies the argument that the state may not adopt a federal standard that is less effective than a state standard does not apply to the present rulemaking, and the status of this rulemaking as a Horcher does not alter that opinion. Also, the Horcher process does not require the state to adopt a federal standard in its entirety; parts of existing state standards that are at least as effective as federal standards may be retained, as was in the most recent crane standard Horcher.

Mr. Harrison stated that he supports adopting the Division's rulemaking and addressing the problems brought up by stakeholders through an APA rulemaking. Mr. Jackson asked the Division to respond to the comments made. Mr. Harrison and Ms. Stock agreed. Mr. Donlon responded by saying that the Division did try to follow the Labor Code and proposed adopting the federal requirements through the Horcher process that were as effective as existing California requirements. He explained that the changes in the federal rulemaking were complicated.

Ms. Smisko asked who is commenting on the physical hazards. Ms. Hart responded by saying that the Division will retain the lead on the proposal before the Board today and Board staff is working on a rulemaking to address the physical hazards, and that rulemaking will not be Horchered.

Ms. Stock asked Mr. McDermott for clarification regarding the practical application of adopting the verbatim of the entire federal standard and then sorting out the conflicting areas after that. She stated that if they adopt the federal standard verbatim, and it includes parts that are weaker than the state standard, and then sort out the differences later on then until the differences are sorted out, the federal standard supersedes the state standard in this case. She said that if the Board does not want to adopt something weaker in the interim, then they could just Horcher the parts of the standard that are the same, which would allow the parts of the California standard that are stronger to continue to remain in effect until the differences are sorted out.

Mr. McDermott stated that in the proposed standard and federal standard, there is discussion regarding one positive study. In this section, the Division added a paragraph in the hazard classification section that makes it different from the federal standard. He stated that he is concerned that differences like this that are hidden in the standard may confuse people who read

the federal standard for GHS. He stated that he suggests putting in a separate standard underneath the federal standard that clarifies situations where the California standard is different.

Mr. Jackson stated that in the Informative Digest, the Division, on behalf of the Board, stated that the Board proposes to adopt regulations that are the same as the federal regulations except for editorial and format differences. He said that in the case of this proposal, there are a lot more things going on than just editorial and format differences. He stated that when the Division created this proposal, the only document that they incorporated into it was the Federal Register. He also stated that there are a lot of things in this proposal that were not explained to the Board or the public until today. The Division did not inform the Board or the public as to why there are differences between the California standard and the federal standard, and that this needs to be addressed. He stated that the Division did not give a rationale as to why they are proposing this. He also stated that he wants to make sure that the public knows that there are differences between the California and federal standard and that he would like to see the Division provide a rationale and explanation for the differences.

Ms. Stock concurred with Mr. Jackson and stated that she would like to see the justifications for the differences pulled out in the final statement of reasons.

Response:

The Division intends to deal with state unique issues and the federal language concerns brought up during this rulemaking in a follow-up advisory process. The side-by-side provided with the rulemaking package clearly indicates the rationale for keeping the state language where the Division staff determined that existing language was more protective than the new federal language. Overall there are only a few pages of the proposal affected. Some federal provisions are being addressed by Board staff in the rulemaking on Flammables and Combustibles. The Division plans to address the remaining issues through regular rulemaking, starting with an advisory meeting in April, which will allow the regulated public ample opportunity to provide input. One subject to be evaluated is whether there is a need to make any further amendments to be consistent with existing case law and OSHA interpretations regarding state plans and hazard communications.

Shortly after the advisory meeting the Division will forward to the Board any proposed amendments to Section 5194. The first deadline in the federal GHS adoption is the December 1 2013, training requirement, which is addressed in the Horcher rulemaking. There is a two year transition period in the federal standard which permits employers to comply with either the previous or amended standard in preparing safety data sheets and labels. Both the advisory process and follow-up rulemaking process are anticipated to conclude well before the federal standard takes full effect.

ADDITIONAL DOCUMENTS RELIED UPON

Federal Register, Vol. 78, No. 27, Pages 9311-9315 (February 8, 2013).

This document is available for review Monday through Friday from 8:00 a.m. to 4:30 p.m. at the Standards Board office located at 2520 Venture Oaks Drive, Suite 350, Sacramento, California.

DETERMINATION OF MANDATE

This regulation does not impose a mandate on local agencies or school districts as indicated in the Staff Development Memorandum.

Memorandum

To: Ellen Widess, Chief, DOSH
Deborah Gold, Deputy Chief, DOSH

From: Suzanne P. Marria, Special Counsel, DOSH

Date: January 28, 2013

Re: Rulemaking Process for Amending the California Hazard Communication Standard

Questions:

1. Does Labor Code section 142.3(a) require the California Occupational Safety and Health Standards Board (“Standards Board”) to adopt the complete Federal Hazard Communication Standard (“HCS”) as amended, thereby completely replacing the provisions of the existing California Hazard Communication Standard that the California State plan asserts includes more protective provisions than the comparable provisions of the federal HCS?
2. If not, is the Standards Board authorized by Labor Code section 142.3(a) to use the ‘Horcher’ process to adopt only those provisions of the Federal HCS that California is prepared to adopt as written, and then address any remaining wording differences through an advisory committee process and, if necessary, rulemaking under the California Administrative Procedures Act (“APA”)?

Summary: 1. No; neither Labor Code section 142.3(a), nor the federal Occupational Safety and Health Act, nor the California State plan as approved, require the California State plan to adopt the complete current Federal Hazard Communication Standard (HCS) without changes. As an approved state plan, the Federal HCS, like all federal occupational safety and health standards, sets out the *minimum* standards on this issue. An approved state plan like California may retain or adopt more protective standards addressing the same issues as long as the standards are ‘at least as effective as’ the comparable federal standards. Moreover, Labor Code § 142.3(a) as amended in 1992 by the “Horcher” bill *expressly allows* the Standards Board to use the “Horcher” process to adopt **a portion of a federal standard** and it *expressly mandates* that **any portion of a federal standard adopted to replace an existing state standard or portion thereof must be “at least as effective as the state standard or portion thereof”**.

2. Yes, the Standards Board may use the more expedient “Horcher” process to adopt all of the portions of the federal HCS that are at least as effective as the existing California Hazard Communication standard.

Background

On March 26, 2012, the U.S. Department of Labor, Occupational Safety and Health Administration (“OSHA”) announced it was amending parts of the federal Hazard Communication Standard (“HCS”; 29 C.F.R. § 1910.1200 *et seq*) used in General Industry, Shipyards and the Construction industry to conform to parts of the “Globally Harmonized System of Classification and Labeling of Chemicals”, revision 3, (“GHS”) adopted by the United Nations. (See, 29 C.F.R. parts 1910, 1915, 1926; Federal Register, Volume 77, No. 58, pages 17574-17896, March 26, 2012.)

The California Occupational Safety and Health Standards Board (“Standards Board”) issued a Notice of Proposed Rulemaking stating that at its public meeting scheduled for November 15, 2012, the Standards Board proposed to adopt regulations in Title 8, California Code of Regulations §§ 5194 (California’s Hazard Communications Standard) and related sections, that are the “substantially the same” as the federal regulations promulgated on March 26, 2012. The federal update applies to general industry (in 29 CFR part 1910), shipyards (in 29 CFR part 1915) and construction (in 29 CFR part 1926). The notice stated the proposed regulations “...are the same as the federal regulations except for editorial and format differences.” (Notice, pg. 3.) The Board explained it was in relying on

the explanation by OSHA for these changes as explained in Federal Register, Volume 77, No. 58, pages 17574-17896. The Board's Notice further explained the updated federal HCS pertains to updating HCS warning labels, signs and safety data sheets, to be consistent with the United Nations GHS classification, and labeling of chemicals to inform workers and other downstream users of manufactured and imported chemical products.

The Board's Notice also identified those areas of the updated federal HCS that contain wording differences from the existing California HCS. It noted that the California wording in these areas is more protective than the updated federal HCS, and therefore identified those as 'significant' differences. The Notice explained this was being done "...in order to assure that more protective state standards are preserved and to afford stakeholders with an opportunity to evaluate and comment on the proposed changes..." to those California standards. (Notice, pg. 4.) The Division has announced an advisory committee for this purpose is planned in April 2013.

In the course of the public hearing on the Board's proposed action, several commenters asserted that the Standards Board could not use the "Horcher" process to adopt some but not all of the provisions of the updated federal HCS.

This argument fails based on well-established law regarding the impact of approval of a State OSHA plan, such as the State plan in California, and also conflicts with the express provisions of the California Labor Code § 142.3 called the "Horcher" process.

Discussion – Authority of Approved State Plans to Adopt OSH Standards

California has a long history of protecting workers from occupational safety and health hazards that precedes its approval as a State OSHA plan.¹ The California Occupational Safety and Health Act, found at Labor Code §§ 6300 *et seq*, became effective in 1973. California was initially approved as a State OSHA plan by the U.S. Secretary of Labor on May 1, 1973.²

The State plan has been amended several times since 1973. In June 1997, when the Secretary of Labor approved California's inclusion of amendments to the State plan to include regulations implementing the workplace requirements arising from the requirements of the California Safe Drinking Water and Toxic Enforcement Act (Prop. 65), the Secretary's approval decision explained:

"In enacting the State plan system, Congress' intention was to encourage the States "to assume the fullest responsibility for the administration and enforcement of their occupational safety and health laws." 29 U.S.C. 651(b)(11); 29 CFR 1902.1. Consistent with this Congressional declaration, OSHA has interpreted the OSH Act to recognize that States with approved State plans retain broad power to fashion State Standards." (Fed. Register 62:311159-31181, June 6, 1997, pg. 3; *Supplement to California State Plan; Approval* [Approval of California State Standard on Hazard Communication Incorporating Proposition 65.]

While under the federal OSH Act, OSHA is authorized by Congress to promulgate uniform federal standards, including for example the Federal Hazard Communication Standard, it also "...permits states to assume and maintain regulatory responsibility for areas in which OSHA has promulgated a federal standard." (*Industrial Truck Association v Henry* (1997) 125 F. 3d 1305, 1307 (hereafter *Industrial Truck*.) The federal OSHA standards establish the minimum standard on the issue for state plans to adopt. Once a State plan is approved, "...the standards in the state plan displace applicable federal standards." (*Industrial Truck*, *supra*, at 1307.)

Therefore, as an approved State plan, California must ensure the changes it makes to the California HCS are "at least as effective as" the recently updated federal HCS. But neither the courts nor the Secretary of Labor nor the provisions of Labor Code § 142.3 mandate that California's only option is to adopt all of and exactly the same language as the updated federal HCS.

¹ See, Cal. Constitution, Art XIV, § 4¹; *United Airlines Inc. v Occupational Safety & Health Appeals Board* (1990) 32 Cal. 3d 762, 766.

²38 Fed Register 10717; 29 CFR 1952, subpart K.

The Horcher Process:

California Labor Code section 143.2, like the federal OSH Act, requires the Standards Board to adopt an ‘at least as effective as’ state OSH standard within 6 months of the date any new or amended federal standard is promulgated. (Lab. Code § 142.3(a)(2); 29 U. S. Code, §§ 667(c).)

In 1992, California amended the Labor Code section governing the regulatory mandate and procedures of the Standards Board, to ensure timely adoption of federal OSHA standards while still preserving more protective California safety and health standards. AB 2968 (Horcher), signed by Governor Pete Wilson, became effective January 1, 1993.³ Among other things, it provides a streamlined rulemaking process when California adopts a California occupational safety and health standard or amendment that is ‘substantially the same’ as the corresponding OSHA standard.

“(a)(3) No standard *or amendment to any standard* adopted by the board that is substantially the same as a federal standard shall be subject to Article 5 (commencing with Section 11346) and Article 6 (commencing with Section 11349) of Chapter 3.5 of Part 1 of Division 3 of Title 2 of the Government Code. For purposes of this subdivision, “substantially the same” means identical to the federal standard with the exception of editorial and format differences needed to conform to other state laws and standards.” (Lab. Code § 142.3(a)(3); emphasis added.)

Under the “Horcher” process, the Standards Board may adopt “substantially similar” safety and health standards without first completing the full formal public rulemaking process required by the California Administrative Procedures Act (Gov. Code §§ 11346 *et seq.*). (Lab. Code § 142.3(a)(3).)

The Horcher bill also addressed each possible contingency the Standards Board might face after OSHA adopted or changed an occupational safety or health standard. Those contingencies include: 1) the failure of the Standards Board to act within six months of the federal standard’s promulgation; 2) the result when no existing state standard covers the same issues as the federal standard; and 3) the result when a more protective state standard addressing the same issue or issues exists at the time a federal standard or amendment is promulgated.

“(4) If a federal standard is promulgated and *no state standard that is at least as effective as the federal standard is adopted* by the board *within six months of the date of promulgation of the federal standard*, the following provisions **shall apply** unless adoption of the state standard is imminent:

(A) *If there is no existing state standard covering the same issues*, the federal standard shall be deemed to be a standard adopted by the board and enforceable by the division pursuant to Section 6317. This standard shall not be subject to Article 5 (commencing with Section 11346) and Article 6 (commencing with Section 11349) of Chapter 3.5 of Part 1 of Division 3 of Title 2 of the Government Code.

(B) *If a state standard is in effect at the time a federal standard is promulgated covering the same issue or issues*, the board may adopt the federal standard, or a portion thereof, as a standard enforceable by the division pursuant to Section 6317; *provided, however*, if a federal standard or portion thereof is adopted which replaces *an existing state standard or portion thereof*, the federal standard *shall be as effective as the state standard or portion thereof*. No adoption of or amendment to any federal standard, or portion thereof shall be subject to Article 5 (commencing with Section 11346) and Article 6 (commencing with Section 11349) of Chapter 3.5 of Part 1 of Division 3 of Title 2 of the Government Code.” (underlining and italics added here.)

Subdivision (4)(A) does not apply here because the Standards Board has initiated the “Horcher” process to address the federal update to the HCS and there is an existing California Hazard Communication Standard within the approved State plan.

³ Stats. 1992, ch. 1214, § 1 (AB 2968).

Subdivision (4)(B) applies because there is an existing California safety or health standard (8 Cal. Code Regs. § 5194 and related sections in the Board’s notice) that addresses the same issue as the recently promulgated federal standard. The wording in Labor Code § 143.2(a)(4)(B) could not be clearer: the Standards Board may adopt the federal standard, or *a portion* of the federal standard using the “Horcher” procedure **provided, however, if the federal standard or portion is adopted by the Board to replace the existing California standard, the federal standard must be at least as effective as the existing California standard.** This wording underscores a specific legislative intent of the California Legislature; that is by enacting the Horcher bill, the Legislature intended to preserve any California occupational safety and health standard that is more protective than the corresponding federal standard.

The Division and the Standards Board have proposed to do exactly what Labor Code § 142.3(a)(4)(B) dictates here. The portion proposed for adoption via the “Horcher” process is the vast majority of the wording used in the updated federal HCS.

For wording in the updated federal HCS that is not as protective as the existing California HCS, it may be necessary to draft amendments that go beyond editorial and format changes. Substantive wording changes to the existing California HCS regulations would require formal rulemaking under the California Administrative Procedures Act (Gov. Code §§ 11340 *et seq*) (“APA”). The APA process allows all affected employers and employees to participate.

The remaining subdivisions of Labor Code section 142.3(a)(4) address the effective date of regulations adopted through the streamlined “Horcher” process and publication of the regulations in the California Code of Regulations.⁴

It is important to note that the “Horcher” process rules enacted in Labor Code § 142.3(a) are fully consistent with the minimum requirements for a State plan under the Federal OSH Act.

For these reasons, the process recommended by the Division and Standards Board, to “Horcher” all the updated federal HCS language that is at least as protective as the California HCS standard now and then to address remaining language differences, as necessary, in a subsequent public process, is consistent with Labor Code section 142.3, California’s obligations as an approved State plan and the federal OSH Act.

⁴“(C) Any state standard adopted pursuant to subparagraph (A) or (B) [*referring to subdivision (a)(4)*] shall become effective at the time the standard is filed with the Secretary of State, unless otherwise provided, but shall not take effect before the effective date of the equivalent federal standard and shall remain in effect for six months unless readopted by the board for an additional six months or superseded by a standard adopted by the board pursuant to paragraph (2) of subdivision (a).” (Text in brackets added here for clarity.) (Lab. Code § 142.3(a)(4)(C).)

“(D) Any standard adopted pursuant to subparagraph (A), (B), or (C), shall be published in Title 8 of the California Code of Regulations in a manner similar to any other standards adopted pursuant to paragraphs (1) and (2) of subdivision (a) of this section.” (Lab. Code § 142.3(a)(4)(D).)