Subject: Comments on Sections 1532.3, 5204, 5204.1: Silica Emergency Regulation
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Director of Cal/OSHA

These comments represent my personal opinion and not necessarily the views of my firm or its clients.

There are two basic principles applicable to this matter. First, the OSH Act, the California Labor Code and the California Health & Safety Code reflect the recognition by Congress and the California legislature of the need for reasonably necessary and appropriate occupational safety and health standards to protect workers from exposure to toxic materials such as respirable crystalline silica. Second, regulatory interventions must be based on the legal authority provided by applicable statutory provisions (i.e., pursuant to the rule of law) and not what a regulator may think the law should authorize or what a regulator may think is more expeditious.

Section 144.6 of the California Labor Code states:

> *In promulgating standards dealing with toxic materials or harmful physical agents, the board shall adopt that standard which most adequately assures,* ***to the extent feasible****, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to* ***a hazard regulated by such standard*** *for the period of his working life. Development of standards under this section shall be based upon research, demonstrations, experiments, and such other information as may be appropriate. In addition to the attainment of the highest degree of health and safety protection for the employee, other considerations shall be the latest available scientific data in the field, the reasonableness of the standards, and experience gained under this and other health and safety laws. Whenever practicable, the standard promulgated shall be expressed in terms of objective criteria and of the performance desired (emphasis added).*
> *(Amended by Stats. 1976, Ch. 963.)"*
> **https://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=LAB&division=1.&title=&part=&chapter=6.&article=**

The virtually identical corresponding provision in Section 6(b)(5) of the OSH Act has consistently been interpreted to mean OSHA may establish a Permissible Exposure Limit (PEL) to reduce significant risk from exposure to the hazard (the covered chemical) to the extent of feasibility (technical and economic) but cannot reduce it below either the significant risk level or below a level of feasibility that would put an industrial sector out of business. That provision does not permit OSHA to eliminate the hazard by reducing the exposure to zero -- either by setting a PEL of zero or requiring elimination and noting the availability of substitute products. The fact that some businesses will remain in operation and in violation of a standard cannot be relied on as a basis for adopting an unlawful ban as a matter of administrative convenience to minimize the need to take enforcement actions. The fact that the regulatory body does not know what non-zero exposure level would be necessary to eliminate significant risk does not justify setting an exposure limit of zero. The referenced OSHA Letter of Interpretation (LOI) confirms Federal-OSHA lacks authority to ban a product. **OSHA has no authority to ban use of hexavalent chromium. | Occupational Safety and Health Administration**. **https://www.osha.gov/laws-regs/standardinterpretations/2009-06-29**

In this case, California adopted the Federal crystalline silica standard and then more stringent rules for engineered stone, but reportedly found (as Cal-OSHA reportedly anticipated) almost universal non-compliance with the applicable engineered stone provisions in the sites inspected, as reported in the following excerpts from OSHSB staff and Cal/OSHA evaluations:

Eric Berg, Deputy Chief of Health at Cal/OSHA, gave a silicosis case update to the OSHSB on February 19, 2026. He stated that since the ETS took effect on December 29, 2023, Cal/OSHA opened 138 inspections in countertop fabrication facilities. Out of the 138 shops, 125 were in violation of section 5204 and related Title 8 sections; in other words, about 94% of businesses in California were out of compliance. 25 of these shops were issued an "Order Prohibiting Use," which means the facility was shut down until hazard was fixed.

….

The roughly 140 shops inspected represent only about 10% of the estimated 1,342 fabrication operations statewide. The industry is highly fragmented; most shops are very small (median of just five employees), difficult to locate, and frequently use a variety of tactics to evade enforcement. Current regulations require wet methods, HEPA vacuums, and powered air-purifying respirators (with a 1000 times protection factor). However, these measures may be insufficient, as recent research shows that even fully compliant shops may still expose workers to harmful silica levels, particularly from nanoparticles that current engineering controls cannot adequately capture.

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Considerations on Prohibiting Fabrication and Installation of Artificial Stone: Australia faced a comparable crisis and, after finding that enforcement alone was ineffective, implemented a nationwide prohibition of artificial stone containing more than 1% crystalline silica in July 2024. The ban succeeded: safer alternatives replaced artificial stone without reported job losses or significant consumer impact, and enforcement became dramatically simpler. Prohibiting fabrication and installation of artificial stone in California could substantially mitigate silicosis risk while simplifying enforcement.

A fundamental principle of legal practice when requesting agency action is to cite not only the legal authority for making the request but also the legal authority for the agency to take the requested action. Furthermore, a fundamental principle of administrative law is for a regulatory agency to meaningfully and credibly cite the legal authority under which it is taking rulemaking. Every document I have seen in connection with this matter is silent on the authority of the California OSHSB to set an exposure limit of zero or ban the manufacture or processing of a material in the workplace, even where a substitute product is allegedly available. The documents in Petition file 609 state:

Labor Code section 142.2 permits interested persons to propose new or revised regulations concerning occupational safety and health and requires the Board to consider such proposals and render a decision no later than six months following receipt. Further, as required by Labor Code section 147, any proposed occupational safety or health standard received by the Board from a source other than the Division of Occupational Safety and Health (Cal/OSHA) must be referred to Cal/OSHA for evaluation.

But there is no refence to any document in the Petition 609 file that identifies the legal authority of the Standards Board to adopt an infeasible PEL of zero or, to take an end-run equivalent, and shut down that sector. That is an action within the province of the California legislature, not the Standards Board.

The California Green Chemistry Law provides as follows:

25251. For purposes of this article, the following definitions apply:

(b) "Consumer product" means a product or part of the product that is used, brought, or leased for use by a person for any purposes. …

The phrase "use by a person" has been interpreted to include workplace use by workers. *American Chemistry Council v. Department of Toxic Substances Control* (Cal. Ct. App. 2022, pet. for review den. 2023).
https://law.justia.com/cases/california/court-of-appeal/2022/f082604.html.
https://supreme.courts.ca.gov/sites/default/files/supremecourt/default/documents/m03292023%28w%29.pdf

25253. (a) (1) On or before January 1, 2011, the department shall adopt regulations pursuant to this section that establish a process for evaluating chemicals of concern in consumer products, and their potential alternatives, to determine how best to limit exposure or to reduce the level of hazard posed by a chemical of concern, in accordance with the review process specified in Section 25252.5. The department shall adopt these regulations in consultation with all appropriate state agencies and after conducting one or more public workshops for which the department provides public notice and provides an opportunity for all interested parties to comment.

(2) The regulations adopted pursuant to this section shall establish a process that includes an evaluation of the availability of potential alternatives and potential hazards posed by those alternatives, as well as an evaluation

of critical exposure pathways. This process shall include life cycle assessment tools that take into consideration, but shall not be limited to, all of the following:

(A) Product function or performance.
(B) Useful life.
(C) Materials and resource consumption.
(D) Water conservation.
(E) Water quality impacts.
(F) Air emissions.
(G) Production, in-use, and transportation energy inputs.
(H) Energy efficiency.
(I) Greenhouse gas emissions.
(J) Waste and end-of-life disposal.
(K) Public health impacts, including potential impacts to sensitive subpopulations, including infants and children.
(L) Environmental impacts.
(M) Economic impacts.

(b) The regulations adopted pursuant to this section shall specify the range of regulatory responses that the department may take following the completion of the alternatives analysis, including, but not limited to, any of the following actions:

(1) Not requiring any action.
(2) Imposing requirements to provide additional information needed to assess a chemical of concern and its potential alternatives.
(3) Imposing requirements on the labeling or other type of consumer product information.
(4) Imposing a restriction on the use of the chemical of concern in the consumer product.
(5) Prohibiting the use of the chemical of concern in the consumer product.
(6) Imposing requirements that control access to or limit exposure to the chemical of concern in the consumer product.
(7) Imposing requirements for the manufacturer to manage the product at the end of its useful life, including recycling or responsible disposal of the consumer product.
(8) Imposing a requirement to fund green chemistry challenge grants where no feasible safer alternative exists.
(9) Any other outcome the department determines accomplishes the requirements of this article.

The Cal/OSHA process is an attempt to impose Section 25253 remedies on engineered silica using a statutory authority that does not require a Section 25253 analysis and was never intended to authorize that remedy.

Rather than pursuing the apparently unauthorized, sledgehammer approach under consideration, the Standards Board should consider adopting the certification process advocated by industry and then broadly advertise the new regulatory scheme (requiring certification) to the industry and the general public with the expectation that Cal/OSHA will seek severe sanctions against those who knowingly proceed with the regulated activity without the required certification. In the unlikely event that regulatory scheme is found adequate, Cal/OSHA should consult with the Governor's office and the California Department of Toxic Substances Control to determine whether DTSC should pursue an action under the Green Chemistry Law.

Thank you for your consideration.

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