



December 17, 2020

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Chief Justice Tani Cantil-Sakauye and
Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4797

Re: Request for Depublication — *American Chemistry Council v. OEHHA*, No. C079078 (Cal. Ct. App., Third App. Dist. Oct. 19 & Nov. 10, 2020)

Dear Chief Justice Cantil-Sakauye and Associate Justices:

On behalf of the Atlantic Legal Foundation, I am writing in accordance with California Rules of Court, rule 8.1125(a), to request depublication of the Opinion filed by the California Court of Appeal, Third Appellate District, in the above-referenced appeal on October 19, 2020 (as modified without change to the judgment on November 10, 2020). Copies of the Opinion and Modification are appended to this letter. This request is timely because the opinion became final on November 18, 2020. (Cal. Rule of Court, rule 8.264(b)(1).)

For more than four decades, the Atlantic Legal Foundation has advocated for the application of sound science in judicial and regulatory proceedings. We recognize that depublication by this Court is and should be reserved for unusual situations, such as where publication of a Court of Appeal opinion may do harm. This is such a case. The California Supreme Court has most often depublished opinions where a Court of Appeal decision was “wrong on a significant point” or the opinion “was too broad and could lead to unanticipated misuse as precedent.” (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2019) ¶11:180.1, p. 11-74.) Both criteria are satisfied here.

The Third Appellate District upheld the decision of the California Office of Environmental Health Hazard Assessment (“OEHHA”) to list bisphenol A (“BPA”)—a chemical that has been widely used in connection with the manufacture of food and beverage packaging and containers—as a human reproductive toxicant under the California Safe Drinking Water and Toxic Enforcement Act of 1986, Health & Safety Code §§ 25249.5 *et seq.* (“Proposition 65”), and OEHHA’s implementing Authoritative Bodies Listing Mechanism, Cal. Code Regs., *tit.* 27, § 25306 (“Regulation 25306”). OEHHA listed BPA as a reproductive toxicant even though (i)

the authoritative body that OEHHA relied upon—the National Toxicology Program (“NTP”)—expressly concluded in a scientific monograph that there is insufficient evidence to conclude that BPA is a human reproductive toxicant, and (ii) OEHHA disregarded the determination of its own Developmental and Reproductive Toxicant Identification Committee (“DART-IC”) (the “State’s qualified experts”), a determination based in part on the NTP monograph, that BPA should not be listed under Proposition 65 as a human reproductive toxicant. The Court of Appeal’s ruling that OEHHA did not abuse its discretion in listing BPA as a reproductive toxicant undermines the Authoritative Bodies Listing Mechanism, misinterprets and misapplies the Proposition 65 listing criteria, and is written so broadly that it is likely to engender widespread misuse.

Health & Safety Code section 25249.8 “sets out three different ways by which a chemical can be listed as causing cancer or reproductive toxicity.” (*Exxon Mobil Corp. v. Office of Env’tl Health Hazard Assessment* (2009) 169 Cal. App. 4th 1264, 1269.) The first two listing mechanisms are pertinent here: “[A] chemical will be listed if the state’s qualified experts [the DART-IC] . . . have determined that the chemical causes cancer or reproductive toxicity.” (*Id.*) Or “a chemical will be listed if a body considered to be authoritative has formally identified it as causing cancer or reproductive toxicity.” (*Id.*)

In September 2008, NTP issued a monograph titled “NTP-CERHR monograph on the potential human reproductive and developmental effects of bisphenol A.” (“NTP M’grph”) (<https://ntp.niehs.nih.gov/ntp/ohat/bisphenol/bisphenol.pdf>). The NTP Monograph stated that there is “***insufficient evidence for a conclusion***” that BPA “causes adverse reproductive or developmental effects in humans.” NTP M’grph at 7 (emphasis added). Following publication of the NTP Monograph, OEHHA’s DART-IC considered BPA for listing as a reproductive toxicant. After reviewing the NTP Monograph and BPA high-dose rodent studies, the DART-IC independently concluded that the results of those studies cannot be extrapolated to humans. OEHHA, however, under pressure from environmental groups, refused to accept the DART-IC’s carefully considered determination. Instead, ignoring NTP’s “insufficient evidence” determination, and contrary to its own Regulation 25306, OEHHA transformed an equivocal observation in the NTP Monograph—that “the possibility that [BPA] may alter human development cannot be dismissed,” NTP M’grph at 7, 38—into a “formal identification” of BPA as a human reproductive toxicant.

Regulation 25306, § (d)(1), states that, “a chemical is formally identified by an authoritative body when [OEHHA] determines that . . . the chemical . . . is the subject of a report which is published by the authoritative body and *which concludes* that the chemical causes cancer or reproductive toxicity” (emphasis added). The NTP Monograph merely observed that the “possibility” that BPA “may” alter human development “cannot be dismissed.” NTP M’grph at 7, 38. Chemicals that are “merely suspected” of causing reproductive toxicity in humans do not qualify for listing under Proposition 65. (*Western Crop Prot. Ass’n v. Davis* (2000) 80 Cal. App. 4th 741, 749.) The NTP Monograph’s findings also do not satisfy OEHHA’s own definition of “causing reproductive toxicity.” (See Regulation 25306, § (g)(2) (“Studies in experimental animals indicate that there are sufficient data, taking into account the adequacy of the experimental design and other parameters such as, but not limited to, route of administration, frequency and duration of exposure, numbers of test animals, choice of species, choice of dosage

levels, and consideration of maternal toxicity, indicating that an association between adverse reproductive effects in humans and the toxic agent in question is biologically plausible.”)

Where, unlike the case here, an authoritative body actually has formally identified a chemical as a human reproductive toxicant, OEHHA must “determine[] whether there was sufficient evidence in the record to support the authoritative body’s formal identification of the chemical as a reproductive toxicant.” (Opinion at 39.) “OEHHA properly can conclude that the authoritative body made the necessary findings based on OEHHA’s review of the scientific literature on which the authoritative body relied and its knowledge of the authoritative body’s methodology.” (*Exxon Mobil*, 169 Cal. App. 4th at 1282.) But OEHHA “cannot substitute its judgment . . . for that of the authoritative body.” (Opinion at 39.)

In stark contrast to the NTP’s unequivocal finding of human reproductive toxicity in connection with the chemical involved in *Exxon Mobil*, the NTP Monograph here concluded that the evidence was insufficient to treat BPA as a human reproductive toxicant. In other words, the type of “pivotal determination” required by *Exxon Mobil* is missing in the NTP monograph on BPA. Despite the DART-IC’s conclusion that BPA should not be listed, OEHHA concocted a pretextual “finding” of human biological plausibility in order to add BPA to the Proposition 65 reproductive toxicant list. In so doing, OEHHA knowingly ignored the totality of the NTP Monograph as well as the determination of its own DART-IC. Because the Authoritative Bodies Listing Mechanism “include[s] little or no independent review” by OEHHA (*Cal. Chamber of Commerce v. Brown* (2011) 196 Cal. App. 4th 233, 259), OEHHA’s attempt to end run NTP (and the DART-IC) and substitute its own judgment for that of the authoritative body on which it supposedly has relied conflicts with Regulation 25306 and should not be memorialized in the form of a published Court of Appeal opinion.

Allowing publication of the Court of Appeal’s expansive reading of OEHHA’s listing authority, a reading supported only by the Opinion’s own *ipse dixit*, is likely to result in the unwarranted listing of numerous additional substances with similarly inconclusive data of human reproductive toxicity. Because the Court of Appeal’s decision is in clear error and would create public confusion if read as broadly as written, it should be depublished.¹

Respectfully submitted,

Hayward D. Fisk

Hayward D. Fisk
Chairman and President
Atlantic Legal Foundation

¹ Atlantic Legal Foundation Advisory Council member John M. Kalas and his colleague Samarth Barot at Hollingsworth LLP, along with Senior Vice President and General Counsel Lawrence S. Ebner and Associate General Counsel Nishani Naidoo, assisted with preparation of this letter.