

HHS



7
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

STEPHEN P. BERZON (SBN 46540)
JONATHAN WEISSGLASS (SBN 185008)
DANIELLE LEONARD (SBN 218201)
Altshuler Berzon LLP
177 Post Street, Suite 300
San Francisco, California 94108
Telephone: (415) 421-7151
Facsimile: (415) 362-8064
E-Mail: sberzon@altshulerberzon.com
jweissglass@altshulerberzon.com
dleonard@altshulerberzon.com

ALBERT H. MEYERHOFF (SBN 541134)
Coughlin Stoia Geller Rudman & Robbins LLP
9601 Wilshire Blvd., Suite 510
Los Angeles, California 90210
Telephone: (310) 859-3100
Facsimile: (310) 278-2148
E-Mail: alm@csgrr.com

Attorneys for Plaintiffs/Petitioners

FILED
ALAMEDA COUNTY

FEB 05 2008

CLERK OF THE SUPERIOR COURT
By Kml Chilton Deputy

MICHAEL E. WALL (SBN 170238)
SELENA KYLE (SBN 246069)
AVINASH KAR (SBN 240190)
Natural Resources Defense Council, Inc.
111 Sutter Street, 20th Floor
San Francisco, CA 94104
Telephone: (415) 875-6100
Facsimile: (415) 875-6161
E-Mail: mwall@nrdc.org
skyle@nrdc.org
akar@nrdc.org

Attorneys for Plaintiff/Petitioner NRDC

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA

SIERRA CLUB; UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO, CLC; NATURAL RESOURCES DEFENSE COUNCIL, INC.; CALIFORNIA LABOR FEDERATION, AFL-CIO; ENVIRONMENTAL LAW FOUNDATION; ENVIRONMENT CALIFORNIA; ENVIRONMENTAL WORKING GROUP; and CATHERINE HOUSTON,

Plaintiffs/Petitioners,

v.

ARNOLD SCHWARZENEGGER, Governor of the State of California; LINDA S. ADAMS, Secretary of the California Environmental Protection Agency; Dr. JOAN E. DENTON, Director of the Office of Environmental Health Hazard Assessment; CARCINOGEN IDENTIFICATION COMMITTEE; THOMAS M. MACK, Chairperson of the Carcinogen Identification Committee; and DAVID A. EASTMOND, JAMES S. FELTON, SOLOMON HAMBURG, MARTIN L. HOPP, DARRYL HUNTER, JOSEPH R. LANDOLPH, JULIET SINGH, WILLIAM L. SPANGLER, and ANNA H. WU, Members of the Carcinogen Identification Committee,

Defendants/Respondents.

Case No.: RGO7356881
FIRST AMENDED COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF AND VERIFIED PETITION FOR WRIT OF MANDATE
Unlimited Civil Case
Dept.: 512
Judge: Hon. Barbara Miller
Trial Date: Not Set

1 Plaintiffs and Petitioners Sierra Club; United Steel, Paper and Forestry, Rubber, Manufacturing,
2 Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC; Natural Resources
3 Defense Council, Inc.; California Labor Federation, AFL-CIO; Environmental Law Foundation;
4 Environment California; Environmental Working Group; and Catherine Houston allege as follows:

5 INTRODUCTION

6 1. This lawsuit challenges the State of California's wholesale failure to protect Californians
7 from harmful chemicals in contravention of the clear will of California voters.

8 2. In 1986, by an overwhelming vote, the voters of California enacted Proposition 65, the
9 Safe Drinking Water and Toxic Enforcement Act, Cal. Health & Safety Code §25249.5 *et seq.*
10 ("Proposition 65" or the "Act"), to better protect California residents and California's water supply from
11 harmful chemicals.

12 3. Proposition 65 requires the Governor to publish a list of chemicals that cause cancer or
13 reproductive and developmental harm, and to update that list on at least an annual basis. Cal. Health &
14 Safety Code §25249.8(a). The Act also makes it unlawful to knowingly discharge a significant amount
15 of a chemical on the list into sources of drinking water, or to knowingly and intentionally expose anyone
16 to the chemical without a warning unless there is no significant risk from doing so. Cal. Health & Safety
17 Code §§25249.5-.6, 25249.9-.10. Proposition 65 thus both protects drinking water and allows
18 Californians to be informed of significant health risks and protect themselves as a matter of personal
19 choice.

20 4. Proposition 65's protections and warnings can be accomplished only through the
21 expeditious listing of hazardous chemicals. The California Court of Appeal has recognized that
22 "Proposition 65 was not intended to produce a one-time list of known carcinogenic chemicals, but rather
23 requires revision of the initial list annually or even more frequently . . . , direct[ing] both [the Governor]
24 and [his appointed experts] to engage in *a diligent, thorough and continuing search for additional*
25 *chemicals* which evolving scientific knowledge demonstrates are subject to the Act." *AFL-CIO v.*
26 *Deukmejian*, 212 Cal.App.3d 425, 441 (1989) (emphasis added). The point of Proposition 65 was to
27 bypass the existing slow-moving government agencies that had failed to provide Californians protection
28 from toxic chemicals.

1 5. The Governor is assisted in his duty to list harmful chemicals and protect the public by
2 his Office of Environmental Health Hazard Assessment (“OEHHA”), which is a subagency of his
3 California Environmental Protection Agency (“Cal EPA”). With respect to cancer-causing chemicals,
4 the Governor is also assisted in this duty by the “state’s qualified experts,” who the Governor appoints to
5 the Carcinogen Identification Committee (“CIC”). OEHHA coordinates the CIC’s activities.

6 6. Proposition 65 creates four mechanisms to add chemicals to the list of those that cause
7 cancer: 1) the CIC independently determines that a chemical causes cancer; 2) designated outside
8 “authoritative bodies,” usually federal agencies, have determined that a chemical causes cancer; 3)
9 government agencies have formally required a chemical to be labeled or identified as causing cancer;
10 and 4) the chemical is identified as a carcinogen in certain Labor Code provisions. Cal. Health & Safety
11 Code §25249.8.

12 7. The critical process by which the CIC independently designates chemicals as causing
13 cancer has come to a standstill. The CIC has not independently added a new chemical to the list of
14 cancer-causing chemicals *in five years*. During the same five-year period, OEHHA *removed* four
15 chemicals from that list.

16 8. The CIC’s complete failure to act independently to add new chemicals to the Proposition
17 65 list is not for lack of existence of cancer-causing chemicals. During the same five-year period that the
18 CIC independently designated no new chemicals, 29 chemicals were added to the list of cancer-causing
19 chemicals via the outside authoritative body mechanism. That mechanism is extremely time consuming
20 as it first requires final action by other agencies, including slow-moving federal agencies. Even when
21 OEHHA listed chemicals as causing cancer via the authoritative bodies mechanism, it has delayed for
22 many years after the relevant action by the authoritative body prior to listing.

23 9. OEHHA recently rejected a petition requesting expedited consideration of the chemical
24 perfluorooctanoic acid and its salts (“PFOA”) for listing by the CIC. OEHHA refused to even place
25 PFOA on the CIC agenda for consideration. *See* Exs. A (February 22, 2006 Petition) & B (December 6,
26 2006 Letter from Dr. Joan Denton, Director of OEHHA). OEHHA admitted that “exposure to PFOA is
27 an important public health issue,” public exposure is “widespread,” and PFOA “persist[s] in humans.”
28 Ex. B. OEHHA’s reason for refusing to present PFOA to the CIC for consideration for listing is

1 impermissible under Proposition 65: OEHHA wishes to wait for the federal bureaucracy to finish
2 assessing the chemical at some unspecified date years in the future.

3 10. OEHHA also recently announced the results of a "prioritization process" put in place in
4 2004 by OEHHA and the CIC for determining which chemicals should be proposed to the CIC for
5 listing. OEHHA announced that it will present three chemicals to the CIC at its 2007 meeting, but that
6 the CIC will not consider those chemicals for listing. Rather, OEHHA will propose only that the CIC
7 decide whether OEHHA should prepare the initial assessment required to present the chemicals to the
8 CIC for listing at some point in future years. California voters never intended this agency to operate at
9 such a snail's pace. The OEHHA "prioritization" process is yet another example of the abdication of the
10 Proposition 65 mandate.

11 11. Under Proposition 65, the Governor, his agencies, and his experts cannot, consistent with
12 the purposes of and duties imposed by the Act, simply sit back and wait for the slow-moving federal
13 bureaucracy to act with respect to cancer-causing substances. And then, once the federal bureaucracy
14 has acted, they cannot sit back and wait yet again. Nor can they adhere to an unnecessarily bureaucratic
15 and prolonged "prioritization process" that ensures that chemicals will not even be considered by the
16 CIC for listing for *several years*, despite meeting the Proposition 65 standard for causing cancer now.

17 **PARTIES**

18 12. Plaintiff/Petitioner Sierra Club is a nonprofit public-benefit corporation organized and
19 existing under the laws of California, with more than 1.3 million members and supporters, including
20 more than 179,500 members in California, and with one or more chapters in every state. The Sierra
21 Club's purposes include to practice and to promote responsible use of the earth's ecosystem and
22 resources, to enlist and to educate humanity, to protect and to restore the quality of the natural and
23 human environment, and to use all lawful means to carry out these objectives. The Sierra Club was one
24 of the original drafters and proponents of Proposition 65 and has been directly involved in significant
25 toxics litigation in the state of California, including cases enforcing Proposition 65. The Sierra Club
26 brings this action on its own behalf and on behalf of its members.

27 13. Plaintiff/Petitioner United Steel, Paper and Forestry, Rubber, Manufacturing, Energy,
28 Allied Industrial and Service Workers International Union, AFL-CIO, CLC ("USW") is a non-profit

1 labor association with 850,000 members in North America. The USW represents workers who work in
2 California, including in the County of Alameda. The USW has historically taken strong
3 pro-environment policy positions. The USW brings this action on its own behalf and on behalf of its
4 members.

5 14. Plaintiff/Petitioner Plaintiff Natural Resources Defense Council, Inc. ("NRDC") is a
6 national, not-for-profit membership corporation. Founded in 1970, NRDC has more than 79,000
7 members who live in California. NRDC's purposes include the preservation, protection, and defense of
8 the environment, public health, and natural resources. Consistent with this mission, NRDC has
9 advocated and litigated on toxics-related issues, including enforcing Proposition 65. NRDC brings this
10 action on its own behalf and on behalf of its members.

11 15. Plaintiff/Petitioner California Labor Federation, AFL-CIO ("Federation"), is a voluntary
12 federation of affiliated labor organizations representing about 1.5 million working men and women in
13 the State of California. The Federation maintains its headquarters in Alameda County, California. The
14 Federation brings this action on its own behalf, on behalf of its affiliated labor organizations, and on
15 behalf of their members.

16 16. Plaintiff/Petitioner Environmental Law Foundation is a California-based non-profit
17 organization dedicated to improving environmental quality for those most at risk by providing access to
18 information, strategies, and enforcement of environmental, toxics, and community right-to-know laws.
19 The Environmental Law Foundation offices are located in Alameda County.

20 17. Plaintiff/Petitioner Environment California is a statewide, citizen-based, environmental
21 advocacy organization, which focuses on protecting California's air, water, open spaces, and public
22 health. Environment California speaks out and takes action at the local, state, and national levels to
23 improve the quality of the environment and our lives.

24 18. Plaintiff/Petitioner Environmental Working Group ("EWG") is a national, not-for-profit
25 organization that works to protect public health and the environment. EWG's scientists, engineers,
26 lawyers, policy experts, and computer programmers seek to expose health and environmental threats and
27 to find solutions. EWG has an office in Alameda County.

28

1 19. Plaintiff/Petitioner Catherine Houston lives in Alameda County, California. Ms. Houston
2 is the Business Representative of USW Local 1304 in San Leandro, California. Ms. Houston is also a
3 member of the Sierra Club. Ms. Houston paid income taxes to the State of California for tax year 2006
4 and will continue to pay such taxes. Ms. Houston has also paid sales and property taxes to the County of
5 Alameda in 2006 and will continue to pay such taxes.

6 20. Defendant/Respondent Arnold Schwarzenegger is sued in his official capacity as the
7 Governor of the State of California. Proposition 65 imposes on the Governor a mandatory duty to list
8 chemicals that cause cancer and to update that list at least annually. Cal. Health & Safety Code
9 §25249.8(a).

10 21. Defendant/Respondent Linda Adams is sued in her official capacity as the Secretary of
11 Cal EPA. Secretary Adams has oversight authority over OEHHA, which implements Proposition 65,
12 pursuant to California Government Code §§12850-12850.6.

13 22. Defendant/Respondent Dr. Joan Denton is sued in her official capacity as the Director of
14 OEHHA. OEHHA is the lead agency responsible for assisting the Governor in implementing the duties
15 imposed by Proposition 65. Cal. Health & Safety Code §25249.12.(a); 22 C.C.R. §12102(o); Cal.
16 Executive Order W-15-01 (July 17, 1991). OEHHA oversees the Science Advisory Board, including the
17 CIC, and establishes the agenda of the CIC. On December 6, 2006, Dr. Denton denied a request to
18 expedite consideration of PFOA by the CIC for listing under Proposition 65 as a chemical that is known
19 to cause cancer, and refused to place PFOA for consideration on the agenda of the CIC's next meeting.
20 Exs. A, B.

21 23. Defendant/Respondent Carcinogen Identification Committee constitutes the "state's
22 qualified experts" under Proposition 65, and is responsible for advising the Governor on chemicals that
23 are required to be listed as causing cancer. Cal. Health & Safety Code §25249.8(b); 22 C.C.R.
24 §§12102(t), 12302(a), 12305(a). The Governor appoints the members of the CIC (22 C.C.R.
25 §12302(b)(3)), which is comprised of doctors and scientists from academia and industry.

26 24. Defendant/Respondent Thomas M. Mack is sued in his official capacity as the
27 Chairperson of the Carcinogen Identification Committee. Defendants/Respondents David A. Eastmond,
28 James S. Felton, Solomon Hamburg, Martin L. Hopp, Darryl Hunter, Joseph R. Landolph, Juliet Singh,

1 William L. Spangler, and Anna H. Wu are sued in their official capacities as Members of the Carcinogen
2 Identification Committee.

3 JURISDICTION AND VENUE

4 25. This Court has jurisdiction over this action pursuant to the California Constitution,
5 Article VI, Section 10, because this case is a cause not given by statute to other trial courts.

6 26. Venue is proper in this Court because certain of Plaintiffs/Petitioners reside or maintain
7 offices in Alameda County and because the California Attorney General has an office in Alameda
8 County.

9 FACTUAL ALLEGATIONS

10 Proposition 65 Requirements and Violations

11 27. In 1986, the voters of California overwhelmingly enacted Proposition 65, the Safe
12 Drinking Water and Toxic Enforcement Act, Cal. Health & Safety Code 25249.5 *et seq.*

13 28. Among the purposes set forth in Section 1 of Proposition 65 are:

14 The people of California find that hazardous chemicals pose a serious potential threat to their
15 health and well-being, that state government agencies have failed to provide them with adequate
16 protection, and that these failures have been serious enough to lead to investigations by federal
17 agencies of the administration of California's toxic protection programs. The people therefore
18 declare their rights:

17 (a) To protect themselves and the water they drink against chemicals that cause cancer, birth
18 defects, or other reproductive harm.

18 (b) To be informed about exposures to chemicals that cause cancer, birth defects, or other
19 reproductive harm.

20 29. Proposition 65 imposes, as the first step of the regulatory process, a mandatory duty on
21 the Governor to publish a list of chemicals that cause cancer or reproductive and developmental harm,
22 and to update that list *on at least an annual basis*: "the Governor shall cause to be published a list of
23 those chemicals known to the state to cause cancer or reproductive toxicity within the meaning of this
24 chapter, and he shall cause such list to be revised and republished in light of additional knowledge at
25 least once per year thereafter." Cal. Health & Safety Code §25249.8(a).

26 30. The materials presented to the voters in the Official Voter Information Guide further
27 reinforce the Governor's mandatory duty. For example, the Legislative Analyst's Analysis stated: "The
28 measure would *require* the state to issue lists of substances that cause cancer or reproductive toxicity."

1 The Arguments in favor of the ballot initiative stated: “The Governor *must list* these chemicals, after full
2 consultation with the state’s qualified experts.”

3 31. The Governor is assisted in his duty to list harmful chemicals by OEHHA, which Cal
4 EPA oversees. The Governor is also assisted in his duty to list chemicals known to cause cancer by the
5 CIC.

6 32. Proposition 65 creates four mechanisms by which chemicals must be added to the list of
7 chemicals that are known to the state to cause cancer: 1) the CIC, the “state’s qualified experts” under
8 the Act, independently determines that a chemical causes cancer; 2) designated outside “authoritative
9 bodies,” usually federal agencies, have determined that a chemical causes cancer; 3) government
10 agencies have formally required a chemical to be labeled or identified as causing cancer; and 4) the
11 chemical is identified as a carcinogen in certain Labor Code provisions. Cal. Health & Safety Code
12 §25249.8.

13 33. Each of these four processes imposes an independent duty on the Governor, Cal EPA,
14 OEHHA, and the CIC to list chemicals. The state’s qualified expert mechanism for listing chemicals
15 that cause cancer was not intended to be used as a last resort, but rather to bypass bureaucracy and move
16 quickly to protect Californians from cancer-causing chemicals. Under Proposition 65, the CIC cannot
17 wait for federal and other agencies to designate chemicals as causing cancer under their own timeframes
18 and standards, but instead must act independently to consider and list chemicals expeditiously and under
19 the standard provided by Proposition 65. And, when agencies that are authoritative bodies have finally
20 acted, OEHHA cannot wait years before listing the chemicals.

21 34. The Act also provides the standard that the CIC must apply in independently determining
22 that a chemical causes cancer: “A chemical is known to the state to cause cancer or reproductive toxicity
23 within the meaning of this chapter if in the opinion of the state’s qualified experts it has been clearly
24 shown through scientifically valid testing according to generally accepted principles to cause cancer or
25 reproductive toxicity.” Cal. Health & Safety Code §25249.8(b). This standard can be satisfied through
26 evidence of cancer in animals and does not require human epidemiological evidence.

27 35. The CIC is required by regulation to meet “not less than once in any calendar year.” 22
28 C.C.R. §12302(c). Over the past five years, the CIC has only been meeting once each calendar year.

1 36. The CIC has not independently added a new chemical to the list of cancer-causing
2 chemicals in five years. During those five years in which no chemicals have been listed, OEHHA has
3 *removed* four chemicals from the list of chemicals known to cause cancer.

4 37. OEHHA controls the process by which chemicals are placed on the CIC's agenda for
5 consideration. The current process for choosing chemicals to present to the CIC has been in place since
6 2004. Prior to 2004, OEHHA employed a process by which it would *randomly select* chemicals for
7 review and consideration. Beginning in 2004, in response to criticism of this random process, OEHHA
8 and the CIC created a "prioritization" process that purports to more quickly prioritize and analyze
9 chemicals for consideration by the CIC according to risk, but that process has resulted in even greater
10 delays and bureaucratic road-blocks to the listing of chemicals.

11 38. Since OEHHA began to employ this new process in 2004, the CIC has considered only
12 *one* chemical for listing. That chemical, which was considered in 2005, was not listed.

13 39. On September 9, 2007, OEHHA announced a list of three chemicals that it intended to
14 submit to the CIC at its November 2007 meeting for CIC to make a recommendation with respect to "the
15 possible preparation of hazard identification materials." Ex. C. The announcement stated: "No listing
16 decisions will be made concerning these chemicals at this time." That announcement also explained the
17 manner in which OEHHA and the CIC are implementing the prioritization process.

18 40. The prioritization process is unlawful and contrary to Proposition 65 in at least these three
19 ways: 1) only chemicals with human epidemiological evidence of carcinogenicity are being considered;
20 2) chemicals that were designated by OEHHA as candidates for the authoritative body listing mechanism
21 are not being considered; and 3) chemicals will take an extraordinarily long time to be listed.

22 41. The listing process for any chemical will take at least several years, regardless of whether
23 the chemical currently meets the Proposition 65 standard for causing cancer. The steps OEHHA now
24 pursues prior to a listing decision include: 1) initial literature reviews and screenings by OEHHA using
25 human epidemiological and toxicological evidence; 2) a public notice and comment period on the initial
26 proposal that the CIC consider whether OEHHA should prepare hazard identification materials; 3)
27 consideration by the CIC at its annual meeting of whether to recommend that OEHHA prepare hazard
28 identification materials; 4) the preparation of hazard identification materials, including a second search

1 and evaluation of scientific literature; 5) a second notice and public comment period on the hazard
2 identification materials; and 6) a second CIC meeting at which the CIC will deliberate on the listing
3 decision. Given that the CIC chooses to meet only once per calendar year, the delays inherent in this
4 cumbersome and lengthy "prioritization" process are contrary to Proposition 65's requirement that the
5 Governor cause the list of chemicals that cause cancer "to be revised and republished in light of
6 additional knowledge at least once per year thereafter." Cal. Health & Safety Code §25249.8(a).

7 42. OEHHA also controls the authoritative bodies listing mechanism under Proposition 65.
8 OEHHA staff are responsible for monitoring the publications of designated authoritative bodies for
9 chemicals, publishing public notices of proposed listings, and administratively listing the chemicals
10 following the notice period.

11 43. During the past five years, 29 chemicals were added to the Proposition 65 list as known to
12 cause cancer via the outside authoritative body mechanism. Those chemicals had been previously
13 identified by other agencies outside California as causing cancer. The CIC did not consider any of those
14 chemicals for listing prior to the outside authoritative body decision. It can take years for agencies
15 including authoritative bodies to act, which is why Proposition 65 created the independent listing
16 mechanism via the CIC.

17 44. The delay between the outside agency recognition that a chemical causes cancer and
18 OEHHA's listing of the chemical is often many years. Of the 29 chemicals listed by the authoritative
19 bodies mechanism in the past five years, more than half took more than two years to be listed *after* they
20 were identified by an outside authoritative body as causing cancer. One chemical, Diuron, a common
21 agricultural pesticide widely detected in California's water supply, was not listed until 2002 even though
22 the EPA identified the chemical as causing cancer in 1997. Another chemical, the insecticide Propuxur,
23 was finally listed by OEHHA in 2006, almost *10 years* after it was identified by the authoritative body as
24 causing cancer. Other chemicals have taken many years to list, including: bromoethane (11 years); o-
25 Phenylphenol (6 years); airborne carbon black (6 years); ethylbenzene (4.5 years); and nickel compounds
26 (4.5 years). In addition, OEHHA has pending before it three chemicals that it proposed for listing in
27 2000 based on designation by authoritative bodies as causing cancer in the 1990s, that have not yet been
28 listed.

1 45. Proposition 65 also imposes on OEHHA a nondiscretionary, ministerial duty to list
2 chemicals identified as carcinogens or developmental or reproductive toxicants by reference in
3 California Labor Code Sections 6382(b)(1) and 6382(d). Cal. Health & Safety Code §25249.8(a).
4 Listing of chemicals identified in these Labor Code sections is mandatory. *Id.* For many years, OEHHA
5 has abdicated its mandatory duty to list chemicals pursuant to this provision, and has not listed numerous
6 chemicals identified in these Labor Code provisions.

7 PFOA

8 46. On February 22, 2006, Plaintiffs/Petitioners Sierra Club, USW, NRDC, ELF,
9 Environment California, and EWG requested OEHHA to propose PFOA for consideration and listing by
10 the CIC under Proposition 65 as a chemical that is known to cause cancer. Ex. A.

11 47. PFOA belongs to a class of chemicals known collectively as the perfluoroalkyl acids
12 (PFAAs). PFOA is a synthetically-produced fluorochemical compound that is ubiquitous in modern
13 consumer and industrial products. PFOA is used to create non-stick and stain-resistant surfaces on
14 consumer products including cookware. PFOA also has numerous and varied industrial uses, in almost
15 all industry segments, including the aerospace, automotive, building/construction, chemical processing,
16 electrical and electronics, semiconductor, and textile industries. Because PFOA is not naturally
17 occurring, all PFOA in the environment is attributable to human activity.

18 48. The stable carbon-fluorine bonds that make PFOA such a pervasive and successful
19 industrial and consumer product also result in its persistence. *There is no known environmental*
20 *breakdown mechanism for this chemical.* As a result of the chemical's stability and pervasive use, the
21 concentrations of PFOA have rapidly increased in the soil, water, and air, and in biological systems,
22 including humans and animals. Numerous studies have shown that non-occupational exposure to PFOA
23 occurs *daily*, in people of all ages, from infants to the elderly, and that the chemical may persist in
24 human blood *for years*.

25 49. As a result of its pervasive use in consumer and industrial products, PFOA is virtually
26 universally present in the blood of the general U.S. population, and around the world. One study found
27 that approximately 96% of the U.S. children tested had PFOA in their blood. Two studies have found
28 PFOA in donated adult blood from a Los Angeles blood bank and in California's children. Measurable

1 levels have been documented also in the umbilical cord blood of a very high proportion of newborn
2 infants in the United States.

3 50. The bio-accumulation of PFOA is a very serious concern in light of the body of evidence
4 that demonstrates that PFOA causes cancer. Multiple studies have documented that PFOA causes cancer
5 in animals.

6 51. On February 15, 2006, the Science Advisory Board of the U.S. Environmental Protection
7 Agency ("U.S. EPA"), which consists of non-government scientific experts drawn from academia and
8 industry, voted to approve a recommendation that the U.S. EPA characterize PFOA as "likely to be
9 carcinogenic" in humans. The evidence on which this recommendation was based meets the standard
10 for listing PFOA as known to cause cancer under Proposition 65. Unfortunately, EPA's final decision
11 remains stymied, with no estimated date for conclusion.

12 52. Rather than expedite consideration of whether PFOA causes cancer by placing it on the
13 agenda at the next CIC meeting, OEHHA decided instead simply to ask the CIC, at its meeting on
14 November 16, 2006, for a non-binding *recommendation* as to whether OEHHA should place PFOA on
15 the CIC's agenda on an expedited basis.

16 53. On November 16, 2006, the members of the CIC voted four to three to consider PFOA
17 for listing at its next meeting. The fourth vote was that of Dr. Anna Wu, who left the meeting early but
18 informed Dr. Thomas Mack, the Chair of the CIC, of her vote before leaving. Dr. Mack announced the
19 four votes in favor of "expedited" consideration of PFOA. Because Dr. Wu left the meeting and cast her
20 vote by proxy, it was later determined that her vote should not be counted, and OEHHA decided that the
21 vote was actually three to three with one abstention.

22 54. On December 6, 2006, Dr. Denton sent a letter denying the request that the PFOA listing
23 process be expedited. Ex. B. As a result of Dr. Denton's decision, the CIC would not consider PFOA
24 for listing at its next meeting.

25 55. Dr. Denton explained that "additional valuable scientific information on the
26 carcinogenicity of PFOA is expected to generated within the *next several years*." (Emphasis added.)
27 Specifically, the U.S. EPA "nominated PFOA-type compounds as a class for testing to the National
28 Toxicology Program (NTP)," which "is planning to test PFOA in two-year carcinogenicity studies

1 employing *in utero* exposure.” In addition, Dr. Denton relied on the long-delayed U.S. EPA process:
2 “U.S. EPA also plans to update its health assessment on PFOA to include new toxicity data and then to
3 resubmit the assessment to the Science Advisory Board for review.” Dr. Denton thus refused to allow
4 the state’s qualified experts, the CIC, to determine whether PFOA causes cancer under the Proposition
5 65 standard, in light of the agency’s preference to allow the federal government to take the lead, in direct
6 contravention of the mandate imposed by the voters in Proposition 65 that California should act
7 independently of and more quickly than the pre-existing bureaucratic agencies in identifying cancer-
8 causing chemicals.

9 56. As a result of this decision, PFOA, a chemical that meets the Proposition 65 standard for
10 a chemical that causes cancer *now*, will only be eligible to be considered by the CIC for listing at the
11 very earliest several years in the future.

12 **FIRST CAUSE OF ACTION**

13 **AGAINST ALL DEFENDANTS/RESPONDENTS**

14 **(Petition for Writ of Mandate: Violation of Mandatory Duty)**

15 57. Plaintiffs/Petitioners incorporate by reference the allegations set forth in the previous
16 paragraphs.

17 58. At all relevant times, Defendants/Respondents have had a clear, present, and ministerial
18 duty to revise and republish a list of chemicals that are known to the state to cause cancer via the
19 independent review by the state’s qualified experts, the CIC, in accordance with the standard provided in
20 Proposition 65.

21 59. Despite their ability to perform this ministerial duty, Defendants/Respondents have
22 systematically failed and refused to comply with their duty by refusing to consider and list chemicals via
23 the CIC’s independent review, including most recently PFOA.

24 60. As a separate and additional matter, at all relevant times, Defendants/Respondents have
25 had a clear, present, and ministerial duty to revise and republish a list of chemicals under Proposition 65
26 via the authoritative bodies listing mechanism.

1 listed by the CIC, Defendants/Respondents have abused any discretion allowed by Proposition 65 by
2 acting in a manner inconsistent with the statute.

3 69. By refusing to allow the CIC to consider PFOA for listing under Proposition 65 until the
4 federal EPA completes its study of the chemical, Defendants/Respondents have abused any discretion
5 allowed by Proposition 65 by acting in a manner inconsistent with the statute.

6 70. By delaying the listing of chemicals for years after the relevant action by an authoritative
7 body that qualifies the chemical for listing under Proposition 65, Defendants/Respondents have abused
8 any discretion allowed by Proposition 65 by acting in a manner inconsistent with the statute.

9 71. By failing to list under Proposition 65 chemicals identified by reference in California
10 Labor Code Sections 6382(b)(1) and 6382(d), Defendants/Respondents have abused any discretion
11 allowed by Proposition 65 by acting in a manner inconsistent with the statute.

12 72. Plaintiffs/Petitioners have no plain, speedy, and adequate remedy at law to compel
13 Defendants/Respondents to comply with their legal obligations.

14 73. There are no administrative remedies available to Plaintiffs/Petitioners to obtain the
15 requested relief.

16 **THIRD CAUSE OF ACTION**

17 **AGAINST ALL DEFENDANTS/RESPONDENTS**

18 **(Injunctive Relief)**

19 74. Plaintiffs/Petitioners incorporate by reference the allegations of fact set forth in the
20 previous paragraphs.

21 75. By systematically refusing to allow the CIC to consider and list chemicals known to the
22 state to cause cancer, including PFOA; by employing a "prioritization" process that prevents chemicals
23 from being considered by the CIC for reasons inconsistent with Proposition 65 and that requires an
24 excessively long time to list any chemical; by failing to list promptly chemicals that qualify for listing
25 via the authoritative bodies mechanism; and by failing to list chemicals identified by reference in
26 California Labor Code Sections 6382(b)(1) and 6382(d), Defendant/Respondents have caused, are
27 causing, and will continue to cause irreparable harm. These harms will continue unless these Defendants
28 are restrained and enjoined by this Court.

1 76. Plaintiffs have no plain, speedy or adequate remedy at law. It would be extremely
2 difficult to measure the amount of monetary damages that could compensate California residents who
3 continue to be exposed to hazardous chemicals without their knowledge because
4 Defendants/Respondents have not included those chemicals on the Proposition 65 list. The acts of the
5 Defendants/Respondents will cause great damage to Plaintiffs and the population of California unless
6 each of them are immediately restrained from continuing their unlawful acts.

7 **FOURTH CAUSE OF ACTION**
8 **AGAINST ALL DEFENDANTS/RESPONDENTS**
9 **(Declaratory Relief)**

10 77. Plaintiffs/Petitioners incorporate by reference the allegations set forth in the previous
11 paragraphs.

12 78. An actual controversy has arisen and now exists between Plaintiffs/Petitioners and
13 Defendants/Respondents as Plaintiffs/Petitioners contend that Defendants/Respondents have and
14 continue to violate a mandatory duty to list chemicals under Proposition 65, have and continue to abuse
15 any discretion they may have with respect to the listing of chemicals, and have denied a request that
16 PFOA be expedited for consideration for listing by the CIC.

17 79. Plaintiffs/Petitioners therefore seek a declaration that: 1) Defendants/Respondents have
18 violated a mandatory duty imposed by Proposition 65 or abused their discretion by the systematic failure
19 of the state's qualified experts, the CIC, to consider and list chemicals as known to cause cancer via their
20 independent review, including PFOA; 2) Defendants/Respondents may not refuse to permit the CIC to
21 consider a chemical for listing as a chemical that causes cancer under the Proposition 65 standard
22 because an outside authoritative body is also considering regulating the chemical, or because OEHHA
23 has designated that chemical as potentially eligible for listing under the authoritative bodies mechanism;
24 3) Defendants/Respondents may not refuse to permit the CIC to consider a chemical for listing as a
25 chemical that causes cancer under the Proposition 65 standard because there is no human
26 epidemiological evidence available for that chemical; 4) Defendants/Respondents have violated a
27 mandatory duty imposed by Proposition 65 or abused their discretion by failing to list chemicals
28 promptly after an authoritative body has taken the relevant action that qualifies the chemical for listing;

