Neil Bogatz
General Counsel

August 25, 2008

Dave Walls
Executive Director
California Building Standards Commission
2525 Natomas Park Dr., Suite 130
Sacramento, CA 95833

Re: Express Terms – Amendment to 2007 California Plumbing Code

Dear Mr. Walls:

I am writing on behalf of the International Association of Plumbing and Mechanical Officials ("IAPMO") to comment on the Express Terms for the California Building Standards Commission's recently noticed amendments to the 2007 California Plumbing Code ("CPC") addressing mitigation measures for the use of PEX pipe and fittings ("Proposed Amendments" or "Proposed PEX Regulations").

It is important to emphasize at the outset that IAPMO takes no position on the substance of the Commission's Proposed Amendments addressing the use of PEX pipe in California. For more than eighty years, IAPMO's Uniform Plumbing Code or its predecessor codes have served as the basis for California plumbing standards. While committed to working cooperatively with the state and local governments to facilitate use of IAPMO's codes and standards, IAPMO does not participate in the state's review and amendment process. It has always been our policy that any state or local amendments or revisions to the model codes are solely the concern of the proper regulatory authorities.

I write instead to offer a technical objection to the form of the Commission's Proposed Amendments. Specifically, IAPMO objects to the proposed designation of a particular Listing Agency, i.e., NSF International, to perform the conformity assessment certification contemplated by the Proposed Amendments. We believe that a regulation mandating product certification by a single, designated Listing Agency is unprecedented in the California Building Standards Code, serves no legitimate policy rationale, is unnecessarily narrow and may violate the California Constitution's prohibition against "special statutes."

The Commission's Proposed Amendments would add the following language to CPC section 604.1:

> *All PEX pipe, tube, and fittings carrying water in potable water systems intended to supply drinking water for human consumption to fixtures and appliances shall also receive* ***NSF certification*** *that any leached concentrations of methyl-tert-butyl ether (MTBE), tertiary buytl alcohol (TBA), or California Proposition 65 chemicals are below the relevant California Maximum Contaminant Level (MCL), secondary MCL, notification, or Safe Harbor level or other applicable Proposition 65 level for those chemicals. The tubing shall be physically marked in a manner that indicates the pipe is NSF certified for human consumption uses in California.*

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> *For water service areas that have detectable levels of MTBE or TBA in drinking water or where there is known MTBE or TBA contamination of a source of drinking water, PEX tubing installed to supply water for human consumption uses* ***shall be certified by NSF*** *not to leach detectable levels of MTBE or TBA, and be physically marked as such.* (Emphasis Provided)

In describing the "Rationale for the Change," the Proposed Amendments indicate that the added language is necessary to make the provisions of the CPC authorizing the use of PEX consistent with the mitigation measures set forth in the Environmental Impact Report ("EIR") being prepared pursuant to the California Environmental Quality Act on the proposed PEX approval.

The determination of California health and safety standards obviously is an appropriate subject for the responsible state regulatory agencies. We believe, however, that the authors of the EIR have confused the standards development and approval process with the process for certifying conformance with approved standards. As a result, the proposed mitigation designates NSF as the only Listing Agency that may certify PEX pipe to meet these additional California standards.

The requirement that PEX be certified only by NSF is unnecessarily narrow. As long as a specific leaching standard is identified, any accredited third party Listing Agency should be qualified to certify that PEX meets that standard. This would be consistent with the current application of the NSF/ANSI 61 (Drinking Water System Component Standard), which sets minimum health effect requirements for chemical contaminants and impurities that any third party Listing Agency accredited for the aforementioned scope may certify products to meet.

The CPC references numerous standards that plumbing materials must meet. (See CPC § 301.1.3 and CPC Table 14-1.) The CPC requires that all pipe, pipe fittings, traps, fixtures, material and devices used in a plumbing system shall meet the applicable standards referenced in the CPC. (CPC § 301.1.) The specific standards are generally set by various standard setting entities, including NSF, IAPMO, the American Society of Mechanical Engineers ("ASME"), ASTM International ("ASTM"), and Underwriters Laboratories Inc. ("UL"). (See CPC Table 14-1.) Standards may also be set by state statute or regulation. (See, e.g., Health & Saf. Code § 116875 (setting lead standards for plumbing pipe, fittings, solder and fixtures).)

The CPC does not, however, specify a particular Listing Agency to certify that plumbing materials and equipment meet the specified standards. Instead, the CPC provides that any third-party accredited conformity assessment body may certify that a plumbing material meets the standards required in the code.

CPC section 301.1 requires all pipe, pipe fittings, traps, fixtures, material and devices used in a plumbing system to "be listed or labeled (third-party certified) by a listing agency (accredited conformity assessment body) and shall conform to approved applicable recognized standards referenced in this code . . .."

CPC section 214 defines "Listed (Third –party certified)" as:

> Equipment or materials included in a list published by a listing agency (accredited conformity assessment body) that maintains periodic inspection on current production of listed equipment or materials and whose listing states either that the equipment or material complies with approved standards or has been tested and found suitable for use in a specified manner.

CPC section 214 defines "Listing Agency" as:

> An agency accredited by an independent and authoritative conformity assessment body to operate a material and product listing and labeling (certification) system and that is accepted by the Authority having Jurisdiction which is in the business of listing or labeling. The system includes initial and ongoing product testing, a periodic inspection on current production of listed (certified) products, and makes available a published report of such listing in which specific information is included that the material or product conforms to applicable standards and found safe for use in a specific manner.

In North America, the American National Standards Institute ("ANSI") and the Standards Council of Canada ("SCC") are the recognized and accepted accreditation organizations for conformity assessment bodies. All ANSI and SCC accredited certifiers must strictly adhere to the same stringent international standards and requirements of the International Organization for Standardization ("ISO") for independent certification programs and testing laboratories. They must also pass continual assessments by ANSI and SCC to ensure product certifications are consistently accurate, complete, and without bias. These requirements ensure that all ANSI- and SCC-accredited certifiers are equivalent and equally accepted by regulators.

Currently, there are only a handful of accredited conformity assessment bodies that meet the definition of an accredited Listing Agency. These include NSF, IAPMO, UL and the Water Quality Association. These Listing Agencies are all accredited in the United States by ANSI. While some of these Listing Agencies are also standard setting bodies, they are accredited to certify materials and products to meet any applicable standards, including those standards issued by other entities. For example, IAPMO certifies certain materials and products to meet the NSF/ANSI 61 standard and NSF may certify materials and products to meet IAPMO standards.

The Proposed Amendments follow the normal Listing Agency practice in addressing chlorine resistance standards for PEX pipe used in recirculating systems. The Proposed Amendments state that PEX tubing used in continuously recirculating hot water systems where chlorinated water is supplied to the system shall meet the chlorine resistance standard NSF P171 CL-R. They do not state that NSF itself must certify PEX tubing to meet NSF P171 CL-R. As a result, CPC section 301.1 applies to this requirement and requires that such tubing "be listed or labeled (third-party certified) by a listing agency (accredited conformity assessment body)." Thus any third party accredited Listing Agency may certify PEX tubing to meet NSF P171 CL-R under this requirement.

The Proposed Amendments set a supplemental California leaching standard that PEX pipe, tubing and fittings must meet in addition to the NSF/ANSI 61 leaching standard. This supplemental California leaching standard requires that PEX pipe, tubing and fittings be certified to meet the relevant California MCL, secondary MCL, notification, or Safe Harbor level and applicable Proposition 65 level for any leached concentrations of MTBE, TBA or California Proposition 65 chemicals. The proposed supplemental California leaching standard then departs from normal practice by designating NSF as the only Listing Agency that may certify PEX pipe, tubing and fittings to meet the supplemental California leaching standard.

No legitimate rationale exists for specially designating NSF as the sole Listing Agency authorized to certify PEX to meet the supplemental California leaching standard. Other

accredited conformity assessment bodies that meet the CPC's definition of a Listing Agency are equally as capable of performing this certification, as demonstrated by the multiple Listing Agencies that currently certify products to meet the NSF/ANSI 61 leaching standard.

Furthermore, specifying a particular Listing Agency without a valid basis denies equal protection to other equally-qualified Listing Agencies in violation of the California Constitution. The California Constitution generally prohibits "special statutes" or regulations that single out a particular entity or class of entities if there is no rational basis in furtherance of a legitimate state interest for singling out one over the other. (Cal. Const., art. I, § 7; Cal. Const., art. IV, § 16; *Cassel v. Gregori* (1937) 28 Cal.App.2d Supp. 769.)

There is no reason why NSF should be specially designated as the sole Listing Agency for the supplemental California leaching standard. The Proposed Amendments may easily be revised to allow any of the accredited third party Listing Agencies to certify that PEX pipe, tubing and fittings meet the supplemental California leaching standard. Such a regulation would have the same end result without specially designating a particular Listing Agency.

In order to afford equal treatment to all accredited Listing Agencies, IAPMO respectfully proposes the following revisions to Section 604.1 of the proposed PEX regulations:

> *All PEX pipe, tube, and fittings carrying water in potable water systems intended to supply drinking water for human consumption to fixtures and appliances shall also receive ~~NSF~~ certification by an accredited third party Listing Agency that any leached concentrations of methyl-tert-butyl ether (MTBE), tertiary butyl alcohol (TBA), or California Proposition 65 chemicals are below the relevant California Maximum Contaminant Level (MCL), secondary MCL, notification, or Safe Harbor level or other applicable Proposition 65 level for those chemicals. The tubing shall be physically marked in a manner that indicates the pipe is ~~NSF~~ certified by an accredited third party Listing Agency for human consumption uses in California.*
>
> *For water service areas that have detectable levels of MTBE or TBA in drinking water or where there is known MTBE or TBA contamination of a source of drinking water, PEX tubing installed to supply water for human consumption uses shall be certified by* an accredited third party Listing Agency*~~NSF~~ not to leach detectable levels of MTBE or TBA, and be physically marked as such.*

CBSC staff has indicated that the special designation of NSF may have arisen over a concern that different Listing Agencies may use varying testing protocol to determine compliance with the supplemental California leaching standards. This concern, however, does not support the selection of NSF as the sole-designated Listing Agency.

Assuming testing protocol was a valid concern, there would be no legitimate reason why this concern wouldn't extend to NSF testing protocol. If the testing protocol used to determine compliance with the supplemental California leaching standards is a concern to the state, then the state would need to specifically approve whatever testing protocol was used by NSF. Once such a testing protocol was approved, any other accredited Listing Agency would be equally capable of complying with the same protocol, eliminating the need to rely solely on NSF.

Indeed, standards such as NSF/ANSI 61 include both maximum contaminant leaching thresholds and testing protocol, assuring uniform application of the standard.

If testing protocol is, in fact, a concern of the agencies, such a concern may be better addressed by the addition of the following requirement to Section 604.1:

> "*Testing protocol for certification to meet the relevant California Maximum Contaminant Level (MCL), secondary MCL, notification, or Safe Harbor level or other applicable Proposition 65 levels shall receive approval by the California Department of Public Health prior to certification by an accredited third party Listing Agency for human consumption uses in California*"

IAPMO is neutral as to whether such a requirement is necessary, but believes that the above proposal would more narrowly and more effectively address any concern over testing protocol than the current proposal. Limiting the designated Listing Agency to NSF, on the other hand, would not itself address the actual testing protocol used to certify PEX to the supplemental California standard.

As stated at the commencement of this letter, IAPMO's general policy is to remain neutral on any state or local amendments to its model codes. We therefore appreciate your consideration of our very narrow concern regarding the Proposed Amendments.

Sincerely,

Neil Bogatz