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November 27, 2001

Michael L. Nearman
California Building Standards Commission
2525 Natomas Park Drive, Suite 130
Sacramento, CA 95833

RESUBMITTED 8/1/2005

Re: Proposed Building Standards - Title 24, Part 5, California Code of Regulations

Dear Mr. Nearman:

I am writing to challenge the modified text removing the adoption of cross-linked polyethylene tubing (PEX) by reference in the California Plumbing Code (Sections 604.1.1, 604.11, 604.11.1, 604.11.1.2 and Table 14-1) by the agencies listed below as a result of the comments submitted on July 23, 2001 by the California State Pipe Trades Council (the "Council") re: the building standards proposed or adopted by the Department of Housing and Community Development (the "Department" or "HCD"), the Office of Statewide Health Planning and Development ("OSHPD"), the Division of the State Architect, Structural Safety Section ("DSA"), the Department of Health Services ("DHS"), the Department of Food and Agriculture ("DFA") and the California Building Standards Commission (the "Commission"). The building standards that are the subject of this challenge have been proposed or adopted for codification in the 2001 California Plumbing Code, Title 24, Part 5, California Code of Regulations. I submit this challenge in response to notices of public comment and public hearing regarding the proposed standards issued by the Commission on behalf of the proposing or adopting agencies pursuant to the Administrative Procedure Act (Gov. Code §§ 11340 *et seq.*).

Those comments of the Council were submitted late during the previous comment period and have been unanswered to date. The comments are responsible for causing the state agencies involved in the adoption of the California Plumbing Code to change their recommendations by deleting cross-linked polyethylene tubing for inclusion in the California Plumbing Code. The present reaction to the Council comments was based on unfounded accusations and manipulation of definitions and resulted in the agencies making a decision that was substantially unsupported by the evidence, not informed, or balanced, and arbitrary and capricious.

"CEQA requires that decisions be informed and balanced. It must not be subverted into an instrument for the oppression and delay of social, economic, or recreational development or advancement." (*Laurel Heights Improvement Assoc. v. Regents of U.C.* (1993) 6 Cal. 4th 1112 and *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal. 3d 553)

For over twenty years the Council has used CEQA as an instrument for the oppression, delay and obstruction of advancements brought forward in the Uniform Plumbing Code (UPC), which serves as the base document for the California Plumbing Code. The fact that the Council has consistently succeeded in using legalese to manipulate state agencies to incorrectly conduct Environmental Impact Reports does not mean that it should continue nor should it force a requirement on the involved agencies that CEQA applies to this type of regulatory administrative action in issue here (the adoption of a plumbing code).

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The definition for environment in the Public Resources Code is of major importance when reviewing the application of CEQA. The Council interestingly enough did not address this definition. California's definition for environment make it abundantly clear that the choice of materials that are allowed within a structure for the transmission of potable water by the California Plumbing Code have little or no effect on the environment. For these materials which, may or may not, be used to have a "significant effect" on the environment is beyond comprehension.

"Environment means the physical conditions which exist within the area which will be affected by a proposed project, including land, air, water, minerals, flora, fauna, noise, objects of historic or aesthetic significance." (Pub. Resources Code § 21060.5)

How can the potential use of cross-linked polyethylene within a structure affect the physical conditions within the area which will be affected by the proposed project (structure)? The Council has not provided any documentation as evidence that when cross-linked polyethylene has been or would be used within a structure it would have a "effect" on those areas described in the definition for environment. As to the specifically listed items in the definition, "water" is the only word, which may have some application. However, the presence of third party certification under ANSI/NSF-61 and standards created by USEPA easily eliminates that issue.

"CEQA was enacted in 1970 as a system of checks and balances for land-use development. The information gathered under CEQA is used by state and local permitting agencies in their evaluation of proposed projects." (Governor's Office of Planning and Research, Overview of the California Environmental and Permit Approval Process)

The inclusion of cross-linked polyethylene tubing in the California Plumbing Code has nothing to do with "land-use development". This fact alone should be enough to end the delayed use of cross-linked polyethylene tubing in California.

Next, we must look at the word most abused by the Council, "project". The incomplete definition for "project" provided by the Council was, "a 'project' is the whole of the action that has the potential for resulting in a direct or reasonably foreseeable indirect change in the physical environment." The following is the complete definition, which includes wording that changes the picture dramatically. In part (a) "and that is any of the following", which is wording relating to "land-use development" consistent with the legislative purpose outlined above. The reader should also keep in mind the definition for "environment".

"(a) Project means the whole of an action, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment, and that is any of the following:

(1) An activity directly undertaken by any public agency including but not limited to public works construction and related activities clearing or grading of land, improvements to existing public structures, enactment and amendment of zoning ordinances, and the adoption and amendment of local General Plans or elements thereof pursuant to Government Code Sections 65100-65700 [Title 7. Planning and Land Use, Division 1. Planning and Zoning, Chapter 3. Local Planning].

(2) An activity undertaken by a person which is supported in whole or in part through public agency contracts, grants, subsidies, loans, or other forms of assistance from one or more public agencies.

- (3) An activity involving the issuance to a person of a lease, permit, license, certificate, or other entitlement for use by one or more public agencies. (CEQA Guidelines, Section 15378)"

CEQA provides additional support of the fact that the potential use of cross-linked polyethylene tubing per the California Plumbing Code is not a "project". One of the first steps in the CEQA process is completion of "Appendix H, Environmental Information Form". I have included the complete form as an attachment. All questions to be answered deal with issues of "land-use development" and areas in the definition of "environment". For example, address of project, assessor's block and lot number, site size, square footage, amount of off-street parking provided, change in existing features of any bays . . ., change in scenic views . . ., site on filled land or a slope of 10 percent or more, describe the project site . . ., describe the surrounding properties . . ., and etc. There are 34 questions on the "Environmental Information Form" all dealing with the "project", and not a single one can be answered in any way shape or form dealing with the potential use of cross-linked polyethylene tubing per the California Plumbing Code.

The abuses and misrepresentations of the past for the wrongful use of the definition for a "project" should not be allowed to continue. Clearly the comments submitted by the Council re: The Proposed Building Standards Would Authorize an Unprecedented Expansion in the Use of Plastic Pipe, continue that abuse. The so-called "unprecedented expansion in the use of plastic pipe" (cross-linked polyethylene tubing) does not come close to meeting any of the conditions of the definition of a "project".

The Council directs us to *Myers v. Board of Supervisors*, Cal. App. 3r 413, 425 to inform all agencies involved that "The courts have held that this exemption does not apply where direct claims are made that a project presents a potential for adverse effects. The *Myers* court held that any express claim of environmental harm was sufficient to trigger CEQA review: [Petitioners'] explicit claims, even if exaggerated or untrue, are sufficient to remove the subject project from the class where it can be seen with certainty that there is no possibility that the activity in question may have significant effect on the environment." At this point we need to review the entirety of what the *Myers* court was speaking to, and focus on the words "explicit claims".

"But appellants have consistently urged that the unusual circumstances surrounding the proposed land division supply the substance and rationale of their opposition to it. Thus, they assert that unlike ordinary individual dwellings each dwelling in this project presents the following unusual circumstances:

- (a) It requires the cutting of an extensive road scar, the placing of residential structure storm drainage improvements and utility poles on steep terrain or across a stream, in an area which is now in a natural condition, and whose public value is recognized by the designation of the road adjoining it as an official county highway;
- (b) The existence of grading on a steep hillside presents the likelihood, recognized in the conservation element of the county plan, of soil eroding away from the grading cuts, down the hillside into the stream creating siltation pollution there and in downstream Chesbro Reservoir;
- (c) Four hundred to eight hundred-foot-long septic tank leach lines from the residences must be run down the hillside and either into and across the creek or along its banks creating the danger of sewage seeping into the stream and polluting it, Chesbro Reservoir and appellant Wilson's' downstream domestic water;

- (d) The water supply system does not meet fire protection standards (American Insurance Association) and the health department notes that even a substandard supply is difficult to develop in this area, all creating a hazard of severe fire on the steep, thickly forested hill;
- (e) At least nine specimen, scenic oak trees will be removed and 8,400 square feet of brush and cover must be graded away."

Those are the "explicit claims" that the *Myers* court was speaking to prior to its finding. All those claims dealt with "land-use development". We ask all the agencies involved to compare the "explicit claims" that the *Myers* court spoke to and compare them to the comments by the Council re: cross-linked polyethylene tubing, which are not "explicit", do not deal with effects on the areas in the definition of "environment" and "land-use development", and are exaggerated and untrue.

Now I will address the issue of whether the possible use of cross-linked polyethylene tubing meets the Public Resource Code meaning of discretionary. Unfortunately, the Council only provided part of Section 21080(a) of the Public Resource Code. The Council presented as a complete quote "discretionary projects proposed to be carried out or approved by public agencies", with the intro that CEQA applies. It is important for all involved in this process to review the entire section, which states:

"Except as otherwise provided in this division, this division shall apply to discretionary projects proposed to be carried out or approved by public agencies, including, but not limited to, the enactment and amendment of zoning ordinances, the issuance of zoning variances, the issuance of conditional use permits, and the approval of tentative subdivision maps unless the project is exempt from this division." (Pub. Resource Code § 21080 (a)).

That is the whole sentence from the definition, in contrast to the repeated habit by the Council of only providing the part of a definition that helps their case. As I provided at the beginning of this challenge "CEQA was enacted in 1970 as a system of checks and balances for land-use development", and the examples in 21080(a), all deal with zoning and permitting for land-use. They do not deal with the adoption of Building Codes. The Building Code only allows the option rather than mandates the use of different materials.

On page 19 of Mr. Cardozo's July 23, 2001 comment he reaches for the "brass ring" by defying all forms of logic. I will repeat what he stated, "there can be no question that under the applicable statutory provisions, the CEQA Guidelines, relevant judicial decisions and the opinions of the Attorney General, and confirmed by past administrative actions and determinations, state agency action to propose or adopt building standards allowing use of PEX are discretionary and therefore subject to CEQA". Is Mr. Cardozo claiming that all "discretionary" actions by state agencies are subject to CEQA? This exceeds all rational thought, or is it only the actions that are not to the liking of the Council that is automatically subject to CEQA?

If the comments by the Council dealing with "project" and "discretionary" actions by agencies are correct, the only logical result of that thinking process is that all proposed changes to the California Plumbing Code are "discretionary" and are a "project" that is subject to CEQA review. I point to the definition of "project" where it states "the whole of an action", and not the bits and pieces of the whole. If that is the case then every change proposed for the California Plumbing Code must be subjected to CEQA review. Selective review of cross-linked polyethylene verses a review of the "whole" of the activity (all proposed changes) is unfairly selective and may well rise to the level of arbitrary and capricious.

Subsequent cases have indicated that an activity needs to have a direct effect on the environment to be a "project" within the scope of CEQA. In *Fullerton Joint Union High School District v. State Board of Education* (1982) 32 Cal. 3d 779, a case involving the potential environmental impacts of a reconfiguration of a school district the court found that CEQA review **was needed**, "[a]lthough it is uncertain whether the total impact will be significant enough to require an environmental impact report, it is clear that it is sufficient to require at least an initial study to **inquire** into the need for such a report." This statement by itself would cause one to believe that CEQA reaches far past the terms used in the definition for "environment" and "land-use" development. **How the court got to its conclusion changes that belief.**

"Although it is conceivable that Fullerton HSD itself could build a high school in Yorba Linda, it is apparent that it does not intend to do so; the future Yorba Linda Unified School District, on the other hand, must construct such a facility. Thus, **as a practical matter** State Board approval of the secession plan is an essential step leading to **ultimate** environmental impact; it is therefore under the reasoning of *Bozung* and *Simi Valley* a "project" within the scope of CEQA (See *People ex rel. Younger v. Local Agency Formation Com.*, *supra*, 81 Cal. App. 3d 464, 478.)" (*Fullerton Joint Union High School District v. State Board of Education* (1982) 32 Cal. 3d 779)

The provisions of the Uniform Plumbing Code (base document for the California Plumbing Code) that allow for the use of cross-linked polyethylene would not require the construction of any "project", and are not "an essential step leading to ultimate environmental impact".

There is additional case law dealing with rates and fees, guidelines, building permits and other activities that have been subject to CEQA review. When one reads the cases (as above) it becomes clear that other events triggered by these activities, dealing with the terms in the definition of "environment" and "land-use development" caused these activities to fall under CEQA review.

There is a quote from the *Myers* court that the Council overlooked, which by itself **should** reverse the deletion of cross-linked polyethylene from the California Plumbing Code by the agencies involved.

"Common sense tells us that the majority of private projects for which a government permit or similar entitlement is necessary are minor in scope -- e.g., relating only to the construction, improvement, or operation of an individual dwelling or small business -- and hence, in the absence of unusual circumstances, have little or no effect on the environment. Such projects, accordingly, may be approved exactly as before the enactment EQA." (*Myers v. Board of Supervisors of the County of Santa Clara*; See also *Friends of Mammoth v. Board of Supervisors of Mono County*)

The adoption by state agencies of the provisions in the Uniform Plumbing Code relating to the inclusion of cross-linked polyethylene tubing in the California Plumbing Code involves the type of project (building of individual dwelling or small business) that the courts have found are exempt and do not require CEQA. CEQA comes into play when the actual project will have an effect on the areas in the definition for "environment" and "land-use development", and not with what piping material may or make not be allowed by the California Plumbing Code.

I therefore, request that the provisions dealing with the use of cross-linked polyethylene tubing (PEX) that were included in the original proposals (Sections 604.1.1, 604.11, 604.11.1, 604.11.1.2 and Table 14-1) by the previously mention agencies be reinstated in the codified California Plumbing Code.

Sincerely,

Robert Friedlander

Attachment: CEQA Appendix H, Environmental Information Form