

April 8, 2015

## VIA EMAIL

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**Re: APTCO, LLC's Comments in Opposition to the January 16, 2015 Proposed Repeal of Article 6 and Adoption of New Article 6, Proposition 65 Clear and Reasonable Warnings**

Ms. Vela:

Riddell Williams P.S. submits these Comments on behalf of APTCO, LLC in opposition to the Office's of Environmental Health Hazard Assessment ("OEHHA") most recent proposed Proposition 65 Clear and Reasonable Warnings amendments.

APTCO thanks OEHHA for the changes it made to its initial proposed warnings amendments in response to public objections submitted during the first round of hearings and comments. OEHHA's proposed amendments, however, continue to be invalid under state and federal law. APTCO, therefore, repeats below the same legal objections it made in its June 13, 2014 written comments.

A regulation that would require that Proposition 65 warning labels on consumer products

contain this symbol  is arbitrary and capricious and entirely outside the bounds of OEHHA's scope of authority to adopt. Further, the proposed regulation allows OEHHA to require businesses to provide OEHHA with information concerning their products, and imposes on businesses the burden and cost of seeking trade secret protection of this information. Such a regulation is arbitrary, capricious and outside the bounds of OEHHA's authority to adopt, and it violates the California public's Fourth Amendment rights under the U.S. and State Constitutions to be free from unreasonable searches and seizures by government officials.

As in the recent past, OEHHA seeks to broaden the scope of its authority under Proposition 65 by proposing regulations that go far beyond the bounds of its statutory authority. California voters authorized OEHHA to require a "clear and reasonable warning" regarding chemicals

listed under Proposition 65. See Cal. Health & Safety Code § 25249.6. The statute provided that “labels on consumer products” are a “clear and reasonable warning.” Id. at § 25249.2(f). In lieu of the “clear and reasonable warning label” the Legislature intended, OEHHA now seeks to require that businesses provide more.

OEHHA is not permitted to require more of businesses than the Legislature authorized or intended. See City of Arlington v. Federal Comm. Comm’n, 133 S. Ct. 1863 (2013) (“[n]o matter how it is framed, the question a court faces when confronted with an agency’s interpretation of a statute it administers is always, simply, whether the agency has stayed within the bounds of its statutory authority”). The Legislature contemplated one clear and reasonable warning message. OEHHA proposes essentially to rewrite Proposition 65.

OEHHA’s proposal violates California’s Administrative Procedure Act (“APA”) in many other ways. For example, OEHHA concludes there is no economic impact, yet it seeks to impose additional and potentially costly requirements on California businesses. OEHHA does not provide the required Economic Impact Analysis (“EIA”) showing that these additional requirements are justified by the health and safety benefits of the new rule. See Cal. Gov’t Code § 11346.3(c)(1). In fact, it is difficult if not impossible to find any specific benefits to the public in OEHHA’s proposals. Instead, OEHHA simply concludes throughout its Initial State of Reasons that its proposal furthers the intent of Proposition 65 by providing more useful information to the public. See id.

OEHHA failed to include an EIA, yet it forces the public to incur significant costs in opposing its proposed regulation. OEHHA is the one that bears the responsibility in a regulatory process of incurring the costs to prove that its proposal is justified. See Cal. Gov’t Code § 11346.3(c)(1). The California public is meant to be protected by a cost-benefit analysis. OEHHA instead places the burden on the public to protect itself by proving OEHHA’s proposed regulation is not justified.

OEHHA proposes to require misleading and unnecessary information on warning labels. The warning symbol it proposes is neither “clear” nor “reasonable” and it is unnecessary. The symbol is not “clear” or “reasonable” because it could be subject to various interpretations by the public and therefore could unnecessarily confuse or alarm the public. It is especially unreasonable (and a violation of the right to free speech) to require businesses to include a warning symbol on their products that is not “clear” and therefore potentially inaccurate. In addition, Proposition 65 addresses potential “exposure.” OEHHA cannot require businesses to place a warning symbol on their products that could be misconstrued to mean more than a potential exposure. Moreover, the proposed symbol is unnecessary because a clear and reasonable warning message is sufficient to warn the public. OEHHA claims this symbol is necessary because it would be “useful information to the public.” How is a confusing and alarming symbol “useful” information?

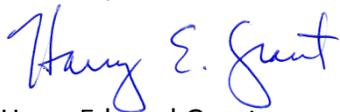
OEHHA's proposal would also encourage more frivolous litigation and increase compliance costs. OEHHA argues that its proposal would strengthen Assembly Bill 227's recent amendment to Proposition 65, which was meant to curtail frivolous "shake down" law suits. The proposed regulation, however, authorizes OEHHA to potentially require businesses to provide to OEHHA specific product information. This will further assist plaintiffs' lawyers in their lawsuits against California businesses. By placing the burden on businesses to seek trade secret protection of the information they provide, OEHHA's proposal would increase the costs on businesses to comply with Proposition 65.

Many of OEHHA's proposals are also vague and would therefore be invalid under the APA. See Cal. Gov't Code at §§ 11342.580; 11349 et seq. It is difficult to understand, for example, exactly what information businesses would need to provide if they were forced to turn over information to OEHHA. It is also not clear what information OEHHA intends to post on its website under its proposal to include "reasonably available information concerning the anticipated level of human exposure." OEHHA is obligated to inform businesses of exactly what its regulation means. If OEHHA cannot draft clear regulations, it must withdraw them. See Cal. Gov't Code at §§ 11342.580; 11349 et seq.

OEHHA's proposals would be preempted by federal law, and they would also be duplicative of and in conflict with other federal and state regulations. For example, federal OSHA requires globally harmonized warning symbols for the workplace, for chemical labels and for safety data sheets. Warning symbols that resemble OSHA's hazard warning symbols are not meant for consumer products. OEHHA de-harmonizes and confuses this field with its proposals, which is one reason they would be pre-empted by federal law.

If adopted, these proposals would be invalid under California and federal law. Most significantly, they would violate the public's constitutional rights. California voters could not possibly have intended to authorize OEHHA to require misleading and potentially false warning symbols on consumer products or to require businesses to turn over information about their products for public use. OEHHA must further amend its proposed consumer product warning amendments or withdraw them from consideration.

Sincerely,



Harry Edward Grant  
Margaret K. Cerrato-Blue<sup>1</sup>  
of  
RIDDELL WILLIAMS P.S.

cc: Scott Hakl

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