



IN WASHINGTON
c/o Wiley Rein LLP
1776 K Street NW
Washington, D.C. 20006
Tel. 202.719.7000
Fax 202.719.7207

April 8, 2015

Monet Vela
Office of Environmental Health Hazard Assessment
P. O. Box 4010
Sacramento, California 95812-4010
E-mail: P65Public.Comments@oehha.ca.gov

Re: Clear and Reasonable Warning Regulations Proposed Rule

Please enter into the record as written comments the attached Battery Council International's (BCI) testimony from the Office of Environmental Health Hazard Assessment's (OEHHA) March 25, 2015 hearing on the Clear and Reasonable Warning Regulations Proposed Rule.

If you have any questions, please contact David B. Weinberg, Wiley Rein LLP, at 202-719-7102 or dweinberg@wileyrein.com.

Sincerely,

A handwritten signature in blue ink, appearing to read "D. Weinberg", is written over a light blue circular stamp.

David B. Weinberg
BCI Legal Counsel



IN WASHINGTON
c/o Wiley Rein LLP
1776 K Street NW
Washington, D.C. 20006
Tel. 202.719.7000
Fax 202.719.7207

March 25, 2015

BCI Comments Regarding the Proposition 65 Proposed Rule

Good morning, my name is Ismael Pedroza, Director of Environmental, Health & Safety at Trojan Battery in Santa Fe Springs, California. Today, I am here on behalf of the Battery Council International, commonly referred to as BCI.

BCI is a non-profit trade association whose members are engaged in the manufacture, distribution, sale, and recycling of lead-acid batteries – products subject to Proposition 65. BCI members account for over 98% of U.S. lead battery production and over 97% of its recycling (*i.e.*, secondary lead smelting) capacity. BCI members operate manufacturing and secondary lead smelting facilities in California, and employ several thousand California workers. BCI appreciates the opportunity to provide input on the California Office of Environmental Health Hazard Assessment's proposed modifications to the Proposition 65 implementing regulations.

All BCI-member lead-acid battery manufacturers today include Proposition 65 compliant warnings on batteries sold in California and other states. The large majority of U.S. lead-acid battery manufacturers were parties to the settlement of a 1999 lawsuit brought by the Mateel Environmental Justice Foundation. It adopted lead-acid battery specific language for our products' warnings. That language reads:

“Battery posts, terminals, and related accessories contain lead and lead compounds, chemicals known to the State of California to cause cancer and reproductive harm. Wash hands after handling.”

That language is still in use today. But BCI is concerned that the currently proposed revisions to the regulations will unnecessarily create confusion regarding the continued applicability of this language and wordings sanctioned in other court-approved settlements entered into under the prior regulations.

BCI agrees with OEHHA's statement in its Initial Statement of Reasons that –quote– “businesses who are parties to a settlement or judgment must comply with the provisions of the court's order, regardless of whether this regulation states that fact” – end quote.

But that is not end of the matter. Companies abiding by court approved language might today be viewed by OEHHA or the public to not be in compliance with the new regulations, even if that view is incorrect. They could even be forced to defend new, duplicative, private enforcement lawsuits. This must be avoided. Absent a clear “grandfather” clause, there is likely to be significant confusion among industry, the public, and private enforcement litigants, and your rules should expressly preclude any such confusion.

Ours is not an unjustified concern. In most instances, it is very likely that members of the public are not aware of the existence or content of any particular court-approved settlement. While the California Attorney General publishes annual lists of the settlements of which it is notified, there is no public database of the contents of those settlements and the Attorney General's office only retains copies for a limited number of years. This makes it difficult for members of the public to become informed about court-approved warning statements. Thus, persons comparing the language on a product subject to a court-approved settlement with the new regulation's safe-harbor language could notice significant differences. This might, understandably, lead some to incorrectly believe those products to not be in compliance with Proposition 65.

Therefore, it is entirely foreseeable that duplicative and unnecessary private litigation will be pursued based on a misunderstanding of the court-approved warning language's compliance with the new regulations, only for the defendant to respond by pointing to the historical court-approved settlement. Even if a limited response proves sufficient to resolve the dispute, court filings require legal assistance and impose otherwise-avoidable costs and burdens on the plaintiff, defendants and the courts.

Furthermore, while BCI and OEHHA understand that the parties to a settlement must continue to comply with that settlement, absent an explicit “grandfather” exemption in the new rules, it may be unclear to a court whether those parties would, in fact, be legally exempted from the new safe harbor language. A private litigant may choose to assert that the old settlement is

no longer sufficient, despite OEHHA's informal and non-binding assurances that it is. Defendants could be forced to prove to a new court that the prior court-approved settlement is binding *and* that it still meets the requirements of the regulations, essentially relitigating the earlier case for no good reason, and at great cost.

On the other hand, a clear and unambiguous "grandfather" clause would provide a clear means for unnecessary defendants to show that existing court-approved settlements are still compliant with Proposition 65, thus alleviating these concerns. While such a clause may not preclude lawsuits from an un-aware or un-informed private litigant, it would clearly indicate to any court that there is no need to re-litigate the prior court-approved settlement, and would allow the prompt and swift disposition of those lawsuits.

BCI also believes that OEHHA should include a streamlined process for non-parties to a court-approved settlement to obtain OEHHA's approval for them to use the same language. Particularly once the updated regulations come into force, in industries such as BCI's where various companies sell similar-looking products, it may create confusion among consumers for otherwise outwardly similar products to carry significantly different Proposition 65 warnings. The goal of Proposition 65 is to inform consumers, not to confuse them.

OEHHA's current proposal to require non-parties to resort to a request for rulemaking under Government Code Section 11340.6 is unnecessarily burdensome on both industry and OEHHA. Small businesses should not be required to pursue a full rulemaking petition for the relatively simply proposal of adopting already court-approved language. Furthermore, if non-parties to a significant number of court-approved settlements seek OEHHA action to approve their use of that language, OEHHA could be faced with overwhelming resource demands to process, evaluate, solicit comment, and go through formal rulemaking on each of those requests. Instead, OEHHA should adopt a more streamlined process by which non-parties can receive direct approval from the agency to use language already approved by a court.

BCI thanks you for your time and attention to our concerns.

* * * *

If you have questions about these comments, please contact David Weinberg, BCI's legal counsel, at 202-719-7102 or dweinberg@wileyrein.com.