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Sent Electronically to: P65Public.comments@oehha.ca.gov

SUBJECT: CLEAR AND REASONABLE WARNING REGULATIONS

Dear Ms. Vela:

The California Hotel & Lodging Association and the California Association of Boutique & Breakfast Inns (collectively **CH&LA**) appreciate the opportunity to submit comments regarding the Office of Environmental Health Hazard Assessment's (**OEHHA**) Notice of Proposed Rulemaking pertaining to Title 27, California Code of Regulations (**CCR**), Article 6, governing "Clear and Reasonable Warning" pursuant to the Safe Drinking Water and Toxic Enforcement Act of 1986, as amended (**Prop. 65**).

CH&LA, in conjunction with years of litigation impacting its members, extensive expert investigation and over \$1.5 million in costs associated with the litigation and expert analyses, developed, implemented and made available to its members, a comprehensive warning system that complies with the statutory mandates of Prop. 65. As discussed below, that system has been utilized by CH&LA members for many years. OEHHA's proposed warning regulations threaten to undo that achievement and put in its place something that is costly and would result in less informative warnings to the public than what currently exists. In short, we urge OEHHA to review the current warning program offered by CH&LA to its members and incorporate that program into any regulatory changes.

For OEHHA's reference:

- CH&LA is the largest statewide lodging industry trade association in the nation. CH&LA's members represent hundreds of thousands of guest rooms in hotels, motels, bed and breakfast inns, resorts, spas, ski resorts, guest ranches, agricultural "homestays," tourist homes, condominiums, timeshares, vacation home rentals, and extended stay establishments, among other transient lodging establishments.

In addition to the foregoing types of establishments, California's

transient lodging industry also includes camps, campsites, camping cabins, "lots" (which also cover tents, camp cars, and camping parties, or other rental units), mobilehomes, and recreational vehicle parks¹. Such facilities and establishments are, for most purposes, treated legally the same as traditional hotels and other types of transient lodging establishments.²

For purposes of this letter, all transient lodging establishments in California, including but not limited to the types of operations identified in the two preceding paragraphs, will be referred to as **hotels**.

- According to Smith Travel Research (**STR**), the lodging industry's primary source of statistical information, there are currently 5,529 hotels (504,614 guest rooms) located in California. Note that STR's profile of the number of hotels in California does not include properties with less than 15 rooms, and this obviously excludes the hundreds of bed and breakfast inns and other hotels under 15 rooms. In addition, STR's statistics do not include the camping sites, campgrounds, recreational vehicle parks, et cetera listed above.
- Most hotels in California are "persons in the course of doing business" and therefore subject to all of the requirements of Prop. 65 in that they will have ten or more full and part-time employees.³

The vast majority of those are smaller operations: for example 75% (4,988 properties) of the California hotels in STR's profile are under 100 rooms in size. Of these, 66% (4,390 properties) are under 75 rooms in size, and 50% (3,348 properties) are under 50 rooms in size.

While the number of full and part-time employees any particular hotel will employ depends on the specifics of the Hotel's operations, a safe rule of thumb is that a hotel with 20 rooms or more will have ten or more employees; however, smaller Hotels in many situations will have ten or more employees as defined by Proposition 65.

The point here is that the vast majority of hotels impacted by OEHHA's proposed regulations are businesses with little-to-no expertise in Prop. 65 or the technical disciplines OEHHA assumes they have to carry out the proposed warning requirements (Title 27, CCR, Sections 25600 – 25608.27 (**Proposed Regulations**)).

This letter will:

Section 1:

- Provide important background regarding the tremendously detrimental impact Prop. 65 has had, and which OEHHA's proposed regulations would exacerbate, on the California hotel and lodging industry.

Section 2:

- Discuss in detail the most problematic aspects of trying to comply with Prop. 65, to wit: the virtually impossible task that businesses in California face in determining whether and when they need to provide warnings (i.e., determining whether or not there is an "exposure" for which a warning is required).

Section 3:

- Analyze specific provisions in the Proposed Regulations that will create problems due to, among other things, ambiguity, lack of clarity, internal conflicts, lack of authority and a lack of necessity.

Section 4:

- Analyze CH&LA's concern regarding OEHHA's elimination of the hotel-specific environmental exposure warning requirements (**Hotel Warnings**) that appeared in OEHHA's March 7, 2014, Pre-Regulatory Draft discussion paper.⁴ While CH&LA maintains concerns about some of the pre-regulatory draft, it is important that the final clear and reasonable warning regulations contain separate provisions focused on hotels and other transient lodging establishments.

Before proceeding, CH&LA wishes to confirm that it has actively promoted its members' compliance with the Prop. 65 warning mandates and will continue to do so. But those mandates must be fair and feasible, take into account the vast quantity of work and analyses CH&LA has already undertaken, and not worsen the already ridiculous litigation environment that promotes frivolous claims and shakedown lawsuits.

CH&LA is part of the California Chamber of Commerce coalition (**coalition**) that is addressing and responding to the Proposed Regulations. The coalition is submitting to OEHHA a letter by the April 8, 2015 deadline, setting forth many concerns and issues regarding the Proposed Regulations.

CH&LA fully supports the coalition's letter to OEHHA, and hereby incorporates it fully herein by reference.

1. Background

During the 1990s, the lodging industry saw the beginning of what turned into an avalanche of Prop. 65 private enforcement actions, and well over a thousand California hotels were eventually hit with Prop. 65 claims. In a great number of cases, claims were made against hotels that had posted warnings that were slightly different than the Prop. 65 "safe harbor" warnings then in effect—differing typically in ways that were substantively insignificant, but which the plaintiffs' bar seized upon (e.g., the failure to capitalize certain words, "unauthorized" punctuation, and wording that was completely accurate and informative, but which varied somewhat from allowed safe harbor language).

The vast majority of the claims were frivolous in that it was obvious that the plaintiffs were just identifying hotels, perhaps through web sites or various travel-related publications, and sending notices to them without ever having actually been to the properties; the plaintiffs' main purpose was to intimidate lodging operators into paying to settle these frivolous claims rather than engaging in expensive and protracted litigation that is inherent in Prop. 65.

As a result of the thousands of claims that were asserted against hotels and other types of businesses, the California State Legislature took some steps, starting with the enactment of Senate Bill 1269 (Chapter 599, Statutes of 1999), to amend Health and Safety Code Section 25249.7. The intent, and hope, was to impose restrictions on the widespread use of "shakedown" Prop. 65 enforcement actions. Not surprisingly, unfortunately, Prop. 65 plaintiffs were not deterred and kept developing new approaches to misuse the amendments in their enforcement activities for continued personal gain.⁵

Against this background, it became obvious to CH&LA that the continuing blitz of frivolous enforcement actions would continue, and this made it imperative that we develop a comprehensive mechanism to shore up hotel warnings in a manner that could be implemented with confidence by all elements of California's diverse lodging industry (see above) to demonstrate compliance and ward off further frivolous claims.

At the end of the 1990s, the lodging industry initiated a process to craft a warning mechanism designed to give guests and others effective warnings that went beyond the safe harbor warnings allowed by the current Prop. 65 warning regulations (Title 27, CCR, Sections 25601 – 25605.2 (**current**

regulations)). CH&LA's warning system provided, through expanded warning verbiage and an industry-specific explanatory brochure that identified the Prop. 65 listed chemicals encountered in lodging establishments of all kinds, as well as information as to how and where listed chemicals might be encountered at lodging establishments. (That brochure, the current version of which is **Attachment A** to this letter, was cited with approval by OEHHA in the preparatory phases of this rulemaking proceeding to illustrate an appropriate way to provide useful information to guests about listed chemicals.)

In fact, there have recently been 60-day notice letters served on a number of hotels by plaintiffs who had not even been to the properties in question. Once it has been pointed out to these plaintiffs that the CH&LA warning mechanism has been in place at the subject hotel, the claims were withdrawn or otherwise not pursued.

This warning system, which was developed in response to litigation involving several hundred hotels, has been used throughout the lodging industry for over a decade by both hotels that were involved in the litigation and those that were not. CH&LA submits that the warning system it developed in response to the litigation is a Prop. 65-compliant alternative to the safe harbor language in that it meets both the letter and the spirit of the Prop. 65 statute. We encourage (and offer to work with OEEHA) to incorporate that system into the proposed regulations. To the extent that the proposed regulations would require a different warning methodology or content and thereby subject hotels to litigation for the continued use of this decade-old system, CH&LA cannot support the changes.

2. Proposition 65's Biggest Problem: It Is Virtually Impossible for Businesses to Determine When And Whether A Warning Is Required

(As pertains to the lodging industry, the most problematic aspect of complying with the Prop. 65 warning requirements involves environmental exposures, and this section will deal with that type of exposure, unless otherwise noted.)

A. Under the Current Regulations

Before any business can start distressing about how and where to provide a Prop. 65 warning, and what the warning should say, it must first decide whether a warning is, in fact, required at all.⁶ This is certainly the most difficult question for any business trying to comply with Prop. 65's warning

obligations to answer. It is also the aspect of Prop. 65 most responsible for frivolous claims by “private enforcers.” *It is precisely the scientific uncertainty and economic infeasibility businesses have in evaluating whether and when a warning is in fact required that plaintiffs' attorneys seize upon to initiate shakedown lawsuits.*

Because of aggressive enforcement and frivolous claims, every business subject to Prop. 65 faces the following conundrum: Failure to furnish a warning when one IS (or, arguably, may be) required is subject to a Prop. 65 claim, but furnishing a warning when one IS NOT (or “might” not be) required can be unnecessary and potentially misleading, and thereby frustrate the purpose of Prop. 65. In other words, business owners must ask themselves, “How do I know if any listed chemicals are involved in my operations, and how do I determine if any of them are at levels that require a warning? Since I lack the knowledge and expertise to make these determinations on my own and it can easily cost tens or hundreds of thousands of dollars to retain a “qualified professional” to enable me make these determinations, what am I supposed to do?”

More specifically: If a private enforcer asserts that a business failed—either intentionally or because of ordinary negligence⁷—to provide a clear and reasonable warning regarding an alleged exposure, the enforcer needs only allege that one of the 800+ listed chemicals is present in a “detectable” amount⁸ and that one or more individuals were exposed⁹ to it. Since private enforcers have very little difficulty demonstrating that the chemical in question is present at a detectable level, and at that point, has essentially presented a sufficient case to shift the burden of proof to the defendant, there are few options left as to how the business can respond.¹⁰

Once the “burden” shifts, the defendant business is required to establish that the alleged exposure did not pose a significant risk by making their case “based on evidence and standards of comparable scientific validity to the evidence and standards which form the scientific basis for the listing of such chemical...”¹¹ Again, this is an extremely daunting and financially infeasible task for hotels in California to undertake.

For example, Sections 25701, *et seq.* of the current regulations sets forth the specific methodologies that a business must employ to establish that there is no significant risk pertaining to cancer in connection with an alleged exposure. A quick perusal of those methodologies¹² makes it clear that only a handful of businesses possess the sophistication, scientific knowledge, and financial wherewithal to meet this burden.

Similarly, Sections 25801, *et seq.* of the current regulations sets forth the specific methodologies that must be employed to establish that there is no significant risk (i.e., “observable effect”) pertaining to reproductive toxicity.¹³ The quantitative assessment mechanism is set forth in Section 25803, and a quick review of the specific tasks involved shows clearly that only the most highly educated and experienced experts can comply with them. And, because such a showing is an issue of fact in a trial court, even getting to that stage in litigation is well beyond the practical means of the vast majority of California businesses.

This leads to the following questions: How does an average business “know” that its operations involve an exposure to a listed chemical? How does the average business know whether or not it meets the criteria of Health and Safety Code Section 25249.10(c)?

There is, unfortunately, little guidance on these questions for virtually all of the hotels and other businesses in California. For example, although OEHHA has attempted to address these issues in its “Frequently Asked Question About Proposition 65,” OEHHA’s guidance creates more ambiguities and problems than it solves:

Q: As a business, how do I know if I need to provide a Proposition 65 warning?

A: Using your knowledge of your business operations and the chemicals you use, review the Proposition 65 list to determine whether your operations or products are likely to expose individuals to any listed chemicals. Depending on the level of exposure, you may be required to provide a warning for those exposures.

OEHHA adopts safe harbor levels (levels of exposure that trigger the warning requirement) for many listed chemicals. Businesses that cause exposures greater than the safe harbor level must provide Proposition 65 warnings. OEHHA does not have safe harbor levels for all listed chemicals. If there is no safe harbor level, businesses that expose individuals to that chemical would be required to provide a Proposition 65 warning, unless the business can show that the anticipated exposure level will not pose a significant risk of cancer or reproductive harm

Determining anticipated levels of exposure to listed chemicals can be very complex. Although a business has the burden of proving a warning is not required, you are discouraged from providing a warning that is not necessary and instead should consider consulting a qualified professional.¹⁴ If you believe an exposure to a listed chemical may not require a Proposition 65 warning. (Emphasis added, endnote omitted.)

Q. What is the acceptable concentration in my product for chemicals listed under Proposition 65?

A. *Proposition 65 applies only to exposures to listed chemicals. It does not ban or restrict the use of any given chemical. The concentration of a chemical in a product is only one part of the process to determine whether consumers must be warned about an exposure to a listed chemical.*

As explained above, OEHHA provides businesses with compliance assistance by establishing safe harbor levels for exposures to listed chemicals.¹⁵ Exposures below those levels do not require a warning.

In general, a business should combine known information about how consumers use their product and how they might be exposed to a listed chemical. For example, a toy might contain small amounts of lead or other listed chemicals in its paint. To determine whether the toy requires a warning, the product's maker would need to consider both the concentration of lead in the paint and scientific information about how a child might handle or mouth the toy and thereby be exposed to the lead. (Emphasis added.)

With all due respect, the “guidance” in OEHHA’s FAQs confirms that there is virtually no way that more than a small handful of businesses can possibly determine whether they have exposures that require warnings. And even if a business goes through that process and makes an informed decision that a warning is not required, to exonerate itself in court will require an exorbitant amount of money and human capital, so that is almost always cheaper and more expedient to settle the claims.

Significantly, OEHHA’s guidance is based on a number of mistaken and unwarranted presumptions.

- It presumes that all businesses will have, or can easily obtain, “knowledge” of the listed chemicals that might be used in its operations. There are over 800 listed chemicals. Only a handful of covered businesses will have the wherewithal or independent knowledge of what chemicals are used in their products or operations. For example purposes only, a basic material safety data sheet is only required to list a chemical present at 1 percent or greater, or 0.1 percent if a carcinogen, so it is not a useful source of information about chemicals that may be present at trace levels. CH&LA therefore submits that this presumption by OEHHA is not warranted for virtually all businesses.
- It presumes that all businesses will have knowledge whether or not the “level of exposure” for any or all of the chemicals used in its operations

requires a warning (i.e., involves a “significant risk”). The FAQs correctly confirms that “[d]etermining anticipated levels of exposure to listed chemicals can be very complex.” Calculating the level of exposure for a chemical is something only a highly specialized professional can accomplish, and only a handful of businesses will be able to undertake this calculation. Further, then, if subject to court challenge, such calculation is subject to attack by private enforcers at a huge cost for the business to defend. Again, CH&LA therefore submits that OEHHA’s presumption that businesses can practically conduct exposure analyses is not warranted.

- It presumes that all businesses will have knowledge of whether the safe harbor level is exceeded for any or all of the chemicals present. These are questions that only a highly specialized professional can answer, and only a handful of businesses will be able to make these determinations. Again, CH&LA submits that this presumption is not warranted for virtually all businesses.
- It presumes, for chemicals for which there are no safe harbors, that businesses will have the knowledge of whether the anticipated exposure level of a particular chemical will or will not “pose a significant risk of cancer or reproductive harm.” These, too, are determinations that only a highly professional can make, and only a handful of businesses will be able to make them. Again, CH&LA submits that this presumption is not warranted for virtually all businesses.
- It presumes that all businesses can determine for each chemical the “concentration of [the chemical] ... and scientific information about how a [person] might be exposed to the [chemical].” These determinations require highly specialized expertise, and only a handful of businesses will be able to secure the expertise to make them. Again, CH&LA submits that this presumption is not warranted for virtually all businesses.
- It presumes that all businesses can make the necessary determinations by, among other things, making a request for an “interpretive guideline” (Title 27, CCR, Section 27203) or asking for a “safe use determination” (Title 27, CCR, Section 27204). However, notably OEHHA has issued very few safe use determinations. Jumping through all of the hoops required for these procedures is beyond the technical, administrative, financial and scientific abilities of all but a handful of businesses. CH&LA submits that this presumption is not warranted for virtually all businesses.

OEHHA takes the position in its FAQs that “[a]lthough a business has the burden of proving a warning is not required, you are discouraged from providing a warning that is not necessary and instead should consider consulting a qualified professional if you believe an exposure to a listed chemical may not require a Proposition 65 warning.” (See the first of the OEHHA FAQs quoted above, emphasis added.) CH&LA very much understands the desire to dissuade “over warning” under Prop. 65, but the proposed regulations do not fix anything that is broken and, to the extent OEHHA believes it does, the cure is worse than the affliction.

Inherent in Prop. 65 itself, in the current regulations, and in OEHHA’s FAQs and other “guidance” is the underlying premise that any business that cannot make the above-described crucial determinations on its own will merely have to retain a “qualified professional” in order to quickly and definitively ascertain whether or not the criteria in Health and Safety Code Section 25249.10(c) have been met—that is the only safe way for businesses to know whether they should or should not provide any particular warning(s). In other words, it is assumed that all of these businesses will have the financial, administrative, and operational wherewithal to consult “a qualified professional.” *This assumption is erroneous.*

With regard to the CH&LA litigation previously described, it was not feasible to conduct individual hotel-by-hotel assessments of whether any listed chemicals were in fact present at some point in time, every place in each hotel where listed chemicals might be present, what the level of exposure to each chemical might be, or whether or not, and in which defined areas, the level of exposure was within a safe harbor level or did not otherwise pose a “significant risk.”

For this reason, CH&LA and its experts examined numerous hotels and their operations to ascertain which chemicals were most likely to be present in typical hotels, and where and how exposures were likely to occur at levels that required warnings. Even this simplified undertaking cost CH&LA many tens of thousands of dollars and resulted in the brochure that is Attachment A hereto. If businesses are required to hire a professional, each business will spend thousands of dollars just to do a preliminary survey of what listed chemicals might be in their operations, and then spend tens of thousands of additional dollars—for each chemical—to conduct an exposure assessment to determine if a warning is required. And due to the nature of performing an exposure assessment and the scientific, behavioral, and other variables involved, the assessment can easily be challenged in court.

The bottom line is that it is simply not feasible for the vast majority of businesses to determine definitively and beyond legal challenge whether a

warning is required under Prop. 65 and, therefore, to safely and reliably understand when and how to comply with the warning requirements.

Therefore, CH&LA submits that warnings that are based on a substantial scientific basis—such as Attachment A to this letter—should be expressly permitted.

B. Under the Proposed Regulations

CH&LA appreciates the fact that OEHHA is aware of the fundamental dilemma described above and is attempting to address it in the proposed regulations. Unfortunately, the proposed regulatory “fix” for this problem does not accomplish the intended goal.

First, Section 25600(a) of the proposed regulations¹⁶ contains the following statement: “Nothing in Article 6 or Subarticles 1 and 2 shall be interpreted to determine whether a warning is required for a given exposure under Section 25249.6 of the Act.” (Emphasis added.) The Initial Statement of Reasons (**ISOR**) explains this statement as follows:

This subsection also explains that the proposed regulations do not address the determination by a business whether or not a warning is required under the Act. ... The proposed regulations only become relevant after a business determines that the exposure to a listed chemical it knowingly and intentionally causes requires a warning. (Emphasis added.)

Stated differently, the proposed regulations are still premised on the assumption that businesses can and will make the types of determinations discussed in the subsection above. OEHHA proposes to address this situation by providing that warnings will only be required when “the area in which an exposure to a chemical known to the state to cause cancer or birth defects or other reproductive harm is reasonably calculated to occur at a level that requires a warning.”¹⁷ (Emphasis added.)

CH&LA appreciates the fact that the term “reasonably calculated” is an attempt by OEHHA to provide greater clarity to businesses as to whether a warning is required in a particular situation. Unfortunately, neither the proposed regulations nor the ISOR provides any guidance at all as to what constitutes a “reasonable calculation” in terms of informing businesses how they can establish whether there is in fact an exposure that involves a significant risk. Therefore, as currently written, and contrary to the governor's proclamations, this aspect of the proposed regulations fails to provide businesses with any meaningful assistance. Further, it fails to comply with the Administrative Procedure Act (Government Code Sections

11340, *et seq.*) (**APA**)), in that, among other things, there is a failure to provide necessity, authority, clarity, and consistency as mandated by Government Code Section 11349 (a) - (d).¹⁸ Further still, it is just this type of uncertainty that opens the door for plaintiffs to sue hotels.

CH&LA Recommendations

CH&LA offers the following recommendations for providing businesses with certainty and to help meet applicable APA requirements that all businesses are clamoring for with respect to determining exactly when they have to provide environmental exposure warnings under Prop. 65:

1. Change the term “reasonably calculated” in Section 25600.1(a) to “reasonably and feasibly calculated.”
2. Provide a clear definition of “reasonably and feasibly calculated,” along with explanatory information, including factors to be considered and examples, demonstrating how a business can reasonably and feasibly make such a calculation.
3. Expressly authorize and permit businesses to rely on the advice of qualified experts that have been retained by individual businesses or industry groups (e.g., CH&LA) to ascertain which listed chemicals are likely to be present in quantities sufficient to require warnings, and to thereby shift the burden of proof to citizen enforcers once a qualified expert has rendered his or her opinion. As previously explained, CH&LA retained qualified experts who identified the listed Prop. 65 chemicals most commonly encountered in hotels, and developed information as to how and where they might be encountered in various aspects of typical hotel operations. (See Attachment A to this letter.) Efforts of this type should be encouraged and expressly allowed, but that is not the case, under the proposed regulations.
4. The issue of assessing when and whether a significant risk of exposure exists should not be addressed on a one-size-fits-all basis. All businesses are different, and they will have varying administrative, organizational, and financial abilities to make this critical determination with respect to their individual operations.
5. Perhaps most important, CH&LA submits that it is critical that the proposed regulations expressly and clearly confirm that, all other things being equal, utilizing the generic “safe harbor” warning mechanisms in the proposed regulations are permissible and will withstand legal challenges, including challenges on the ground that the

business has not made the requisite scientific assessment of whether there is in fact a significant-risk exposure related to its operations.

3. Specific Comments, Concerns, and Recommendations Pertaining to The Proposed Regulations

(As noted earlier, for hotels, the most problematic aspect of complying with the Prop. 65 warning requirements involves environmental exposures, and this section will deal with that type of exposure, unless otherwise noted.)

A. Section 25605 – Environmental Exposure Warnings – Methods of Transmission

Although many hotels are concerned about the warning requirements pertaining to several of the specific product, chemical and area exposure Warnings provisions in the proposed regulation at section 25608, including food and to alcoholic beverages, the most significant Prop. 65 warning requirement applicable to them involves environmental exposures. The “method of transmission” of the required environmental exposure warnings universally used by hotels is a sign of the type specified in Section 25605(a)(1) of the proposed regulations, i.e., “a sign posted at all public entrances.”

Section 25606(a)(1) contains a number of other significant requirements:

A sign posted at all public entrances to the affected area in no smaller than 72-point type that clearly identifies the area for which the warning is being provided. The warning must be provided in a conspicuous manner and under such conditions as to make it likely to be read, seen and understood by an ordinary individual in the course of normal daily activity, must clearly identify the area for which the warning is being provided and must be reasonably associated with the location and source of the exposure. The warning must be provided in English and in any other language used on other signage in the affected area. (Emphasis added.)

The signage requirements proposed in Section 25605(a)(1) raise a number of very important practical problems and questions that must be addressed in order for the Proposed Regulations to pass muster under the APA. These problems include:

(1) The language concerning “affected area”, “identifies the area”, “clearly identify the area” and “reasonably associated with the location and source of the exposure,” in Section 25605(a)(1), are all practically and legally insufficient to guide a covered business and explain exactly what must be done to comply.

How does OEHHA intend these particular requirements be applied in practical terms to a hotel and each of the potential environmental exposures therein? For one example, if a chemical that is on the Prop. 65 list is utilized to treat a swimming pool, is a sign required to have an isopleth indicating the area of potential exposure that requires a warning? If a hotel intends its warnings to apply to the entire property, is that acceptable? Must the warning sign identify each and every space, or type of space, in the establishment for which a warning is required? If the latter, exactly what must the warning say in this regard? Can a hotel sign say things like “public areas, food service areas, and each guest room,” for example, or must it provide a specific space-by-space description, such as “lobby, restaurant, bar, public bathrooms, pool, spa, all guest rooms” and et cetera?

The possible variables in just this one scenario are endless, and without very specific, concrete guidance as to what OEHHA intends in this regard, this provision is completely unworkable and fails to meet APA standards. Further, it is exactly this type of uncertainty and lack of clarity that private enforcers would seize upon subjecting hotels to further unnecessary and frivolous litigation.

(2) Section 25605(a)(1) requires, among other things, that the mandated environmental exposure warning, “must clearly identify the area for which the warning is being provided and must be reasonably associated with the location and source of the exposure.” (Emphasis added.)

We note that the current regulations already require that the warning signs must be “reasonably associated with the location and source of the exposure.” CH&LA submits, however, that this particular requirement has been extremely problematic to comply with, and it has been at the heart of a great many of enforcement claims and lawsuits. This phrase is extremely ambiguous and troublesome, and it will continue to fuel needless enforcement claims.

What does the term “reasonably associated” mean?

- Does it mean that a sign has to be physically located in or near each room, space, or other area where an exposure requiring a warning exists? For example, take the scenario where each guest room contains a listed chemical that requires a warning such as on a smoking floor. If a warning would be required for each guest room, then every hotel will drown in a sea of identical and repetitive warning signs. And, even if that is not OEHHA’s intention, private enforcers may seize on this ambiguity to pursue frivolous claims. That is simply

counterproductive Prop. 65's goals and inconsistent with OEHHA's intention to provide consumers with useful information without numbing their senses with too many warnings.

- Or does the word "associated" mean that each of the warnings posted must identify each exposure, each chemical, and each product or process that involves it? How can any business realistically meet this burden, let alone comprehend it?

(3) The language requires the sign to be in a font at least "72-point type." Note that Section 25608.5(a)(1) of the Proposed Regulations specifies signs at a public entrance to a restaurant or facility be printed in no smaller than 28-point type." (Emphasis added.) If 28-point type is sufficient for the signs posted at public entrances to restaurants, OEHHA does not have a basis for a different point type at the public entrances to hotels.

(4) Section 25605(a)(1) does not specify the font to be used. The current regulations specify ITC Garamond bold condensed font. Is that the font contemplated by the proposed regulations? If so, this must be made clear. If some other font is contemplated, it needs to be identified. Otherwise, this particular aspect of the proposed regulations fails to meet the APA requirements.

If ITC Garamond bold condensed font is in fact what OEHHA intends, it will be impossible for any hotel to include all of the required verbiage (see Section 25606(a)(6)) on a 10" X 10" sign; it would require at least four 8.5" X 11" pages). This is demonstrated in **Attachment B** to this letter.

Moreover, if a particular business' signs have to include the warning in other languages, this problem is made worse.

If CH&LA's assumption that OEHHA's intended use of the use of ITC Garamond bold condensed font is correct, this requirement violates the "necessity", "clarity" and "consistency" criteria of the APA. (As noted in Endnote 19, the Office of Administrative Law (**OAL**) requires that the promulgating agency supply, among other things, "information explaining why each provision of the adopted regulation is required to carry out the described purpose of the provision.")

Further, since the proposed regulations would effectively require all new signage at hotels, OEHHA's claim in the Notice of Proposed Rulemaking that complying with the proposed regulations will have no economic impact on businesses is patently wrong.

These are not just hypothetical “what if” or “anything is possible” issues. As described in Section 1 of this letter, questions such as these necessitated the multi-year litigation CH&LA was involved in, along with the hotel and lodging industry in general, and resulted in the hotel-specific warning program, which is included in Attachment A to this letter.

Importantly, during that litigation, CH&LA sought input from the Attorney General’s office on the warning program it was developing and which it would eventually implement, to which they thought the overarching concept of CH&LA’s program was reasonable.

In short, there is no consensus—among businesses, regulators, or the Prop. 65 plaintiffs’ bar—as to what exactly businesses must do to comply with the current requirement that the warnings “must be reasonably associated with the location and source of the exposure.” In light of the other proposed changes to the warning regulations, this provision will provide additional ammunition to private enforcers to bring frivolous litigation.

For all of the foregoing reasons, CH&LA submits that Section 25605 fails to satisfy APA requirements or the governor's mandate.

CH&LA therefore submits that OEHHA should take the opportunity presented by this rulemaking proceeding to resolve this conundrum by amending Section 25605(a)(1), to read as follows:

A sign posted at all public entrances to the affected area or establishment that clearly identifies the area or establishment for which the warning is being provided. The warning must be provided in a conspicuous manner and under such conditions as to make it likely to be read, seen and understood by an ordinary individual. Notwithstanding the foregoing, and in order to avoid over-warning, the warning sign need not be placed in, adjacent to, or otherwise in connection with any individual area, room, or space within a facility; the warning sign need not identify each item or process which creates a significant-risk exposure; the warning sign need not identify any specific chemical(s) that might cause a significant-risk exposure; the warning sign need not identify the specifics of any particular exposure; and the warning sign need not identify any product, item or process that might be deemed to be a source of any exposure. The warning sign must be provided in English and in any other language ordinarily used by the establishment to communicate with the public. (Recommended new language indicated by underlining.)

B. Section 25606 – Environmental Exposure Warnings – Content

(1) The operations of most hotels will involve a number of the twelve chemicals listed in Section 25602(a); specifically, acrylamide, arsenic, benzene, cadmium, carbon monoxide, chlorinated tris, formaldehyde, lead, mercury, methylene chloride, and phthalate[s].

Section 25606(a)(6) requires that the content in the environmental exposure warnings in these hotels expressly identify each of these chemicals. Section 25606(a)(7) further requires that “[i]n all cases the specific area in which the exposure can occur must be clearly described in the warning message.” This sentence is ambiguous, unclear and seems to require a level of infeasible exactness that private enforcers would seize upon to bring a slate of new frivolous claims. The term “specific area” can mean very different things to different people. How is it to be applied in practical terms to a hotel? If a hotel intends its warnings to apply to the entire hotel property, is that acceptable? Must a hotel instead identify in the sign each and every space, or type of space, in the establishment for which a warning is required? If the latter, exactly what must be stated? Does the sign for a particular space or room have to contain only those chemicals in Section 25602(a) that are present in that particular space or room? Can a hotel say things like “public areas, food service areas, and each guest room,” for example, or must it provide a specific space-by-space description, such as “lobby, restaurant, bar, public bathrooms, pool, spa, all guest rooms” and et cetera? The possible variables are endless, and without very specific, concrete guidance as to what OEHHA intends in this regard, this provision is not only unworkable, but will also serve to further economically incentivizes private enforcers.

Moreover, does OEHHA actually anticipate that a very detailed list of specific areas will be useful to guests and other patrons? Is it expected that they will go to the guest rooms but will not also go to the restaurant, bar, sundries shop, pool, and other spaces? With respect, this ignores reality and does not meet the criteria of the APA.

Clearly, Section 25606(a)(7) violates the APA requirement for clarity (Government Code Section 11349.1). Further, if “specific area” means anything other than the entire hotel itself, it violates the “necessity” mandate in the APA.¹⁹

(2) Page 3 of the ISOR states:

In addition, concerns have been voiced for many years about the lack of specificity in the current safe harbor warning language, which only requires a person to state that an area or a product “contains” a chemical that is known to the State of California to cause cancer, birth defects or other reproductive harm.

The public currently has no simple process for obtaining information about the chemical(s) that are present, whether or how they are actually being exposed to a significant amount of the chemical, how the chemical(s) may cause harm (e.g., adverse effects on fetal development) or ways they can reduce or eliminate these exposures.

A key objective of the proposed regulations is to provide consistent, understandable warnings for exposures to listed chemicals while referring interested individuals to the OEHHA website for more detailed, supplemental information. (Emphasis added.)

Depending on exactly what OEHHA intends by the emphasized verbiage (which is in itself a concern because it lacks clarity), it could be extremely problematic. Simply by including this language in the ISOR, which goes far beyond the statutory mandate, OEHHA potentially gives plaintiffs more methods to target California businesses.

Does OEHHA intend that the above-emphasized ISOR information might actually have to be included in warning signs or otherwise supplied by a business? To the extent that OEHHA intends that businesses will or even may have an obligation to provide this information in warnings, a number of significant problems arise:

- The phrase “the chemical(s) that are present, whether or how they are actually being exposed to a significant amount of the chemical” is particularly troubling. Among other things, it implies that businesses need to conduct a full-blown significant-risk exposure assessment. CH&LA explained in Section 2 of this letter how and why this is simply not a feasible burden to place on businesses. Moreover, it implies that businesses might have to identify more chemicals than those specified in Section 25602.
- The phrase “how the chemical(s) may cause harm (e.g., adverse effects on fetal development)” implies that a business’s warning needs to provide information over and above that which is specified in Section 25606. For example, the phrase how the chemicals may cause harm seems to suggest an explanation that only an expert in toxicology would be able to provide.
- The phrase “ways they can reduce or eliminate these exposures” is particularly alarming. What does OEHHA intend that this information—whether in individual business warning or in the OEHHA website—will include? For example, the most obvious way to avoid relevant chemical exposures might be to not enter a hotel, not to go into

individual guest rooms, and so on. However, and although telling people not to go into a hotel could be the ultimate Prop. 65-compliance hammer, this clearly contradicts the underlying Prop. 65 goal of providing clear and reasonable compliant warnings as a compliance option.

As noted, it is unclear whether OEHHA's intent is to provide consumers with the above-emphasized items of information for consumers via its Internet web page, and/or whether it expects businesses to provide this information in their warnings. If it is the latter, it is simply not realistically practicable for any business. Either way, OEHHA needs to clarify exactly what it intends in this regard; additionally, failure to clarify this language will violate the mandates of the APA.

Moreover, this is the kind of "background" language that the Prop. 65 plaintiffs' bar loves, because they can claim that notwithstanding the language of Section 25606, hotels and other businesses must include in their warnings information on how to reduce/avoid exposures. This opens up a whole new avenue for private enforcers to engage in warning sign "content" claims. CH&LA encourages OEHHA to reevaluate this aspect of its proposal because, among other things, it does not have the statutory authority to require warnings that include ways to reduce exposures.

C. Section 25608 – Specific Product, Chemical and Area Exposure Warnings

CH&LA is concerned about of the individual subsections in this portion of the proposed regulations that deal with "area" (i.e., environmental) exposure warnings. Specifically, in addition to making hotels provide the warning specified in Sections 25605 and 25606 for hotels, Section 25608 will require that individual hotels must also provide separate warnings for a number of other situations. Depending on the specific hotel in question (and putting aside for the moment the warnings required for food and alcoholic beverages), most hotels would have to provide separate warnings for:

- Raw wood (Sections 25608.10 and 25608.11),
- Furniture (Sections 25608.12 and 25608.13),
- Diesel engines (Sections 25608.14 and 25608.15),
- Passenger vehicles (Sections 25608.16 and 25608.17),

- Enclosed parking facilities (Sections 25608.18 and 25608.19), and
- Designated smoking areas (Sections 25608.26 and 25608.27).

Given the aggressive and “creative” minds of some of the Prop. 65 plaintiffs’ bar, CH&LA would not be surprised to see a claim that a hotel is an “industrial operation” and therefore needs to provide separate warnings for petroleum products as well (Section 25608.22 and 25608.23).

To the extent that any or all of the above-noted warning requirements are applicable to a given hotel, the required method of transmission for each of the “specific” warnings is not clear. For example, it is not clear whether separate warnings can be provided (or, indeed, are required) in the sign required by Section 25605 or whether separate warning signs are required. In either case, this aspect of the proposed regulations alone will make it hard to even see the hotel’s entrance due to all of the warning signage.

At the very least, and in the context of a hotel, the above-noted provisions in Section 25608 are unclear, and there is no evidence to show that they are necessary. Hence, they violate the APA for these and other reasons.

More important, the need to provide separate warnings for the exposures noted above makes it clear why it is imperative to CH&LA that OEHHA reinsert specific hotel Warnings, as discussed in the next section.

D. Hotel Warnings

CH&LA has been informed that the hotel Warnings that appeared in earlier drafts of the proposed regulations were deleted in the current version due to OEHHA’s concern that those hotel-specific warning provisions might constitute “over warning,” and thereby defeat the purpose of Prop. 65 to provide meaningful and useful warnings.

As pertains to hotels, subsections A – C of this Section 4 demonstrate why compliance with the current provisions in the Proposed Regulations makes no sense, is impossible from a practical standpoint, would result in many more warning signs being hosted at each hotel, would be extremely expensive and is counterproductive with respect to providing meaningful and useful information to hotel guests.

For this reason CH&LA strongly urges that OEHHA again provide for separate hotel Warnings in the proposed regulations. CH&LA recommends that the language set forth below be used for this purpose. (**Note:** the hotel Warnings in OEHHA’s March 7, 2014, Pre-Regulatory Draft discussion paper

also included apartments. For the sake of simplicity, CH&LA's recommended language below refers only to hotels.)

Section 25608._____ Hotels and Other Transient Lodging Facilities – Method of Transmission

- (1) An 8½" X 11" sign in no smaller than 28-point type otherwise complying with Section 25605(a)(1) at each public entrance to the hotel or other transient lodging facility.
- (2) Hotels and other transient lodging facilities must also comply with the warning methods and content specified for "retail sellers of consumer products," alcoholic beverages, and foods with respect to such exposures that occur on the premises and as specified in Sections 25603, 25604, 25608.1, 25608.2, 25608.3, 25608.4, 25608.5, and 25608.6.
- (3) To the extent that any of the "Specific Product, Chemical and Area Exposure Warnings" enumerated in Section 25608 are applicable to any particular hotel or other transient lodging facility, such specific warnings do not need to be contained in separate warning signs. Instead, a hotel or other transient lodging establishment may provide the appropriate specific warning(s) set forth in Section 25608 by means of a brochure or similar document, available at the registration desk or from a designated staff person, that includes the content required by any of the specific warnings mandated by Section 25608.

Such a brochure or similar document can be suitable for hotels and other transient lodging establishment generally, and it need not be specific to a particular hotel or similar transient lodging establishment, notwithstanding the fact that the some or all of the chemicals identified and other information in the brochure or similar document might not be relevant to the hotel or other transient lodging establishment in question at the time of its posting.

Section 25608._____ Hotels and other Transient Lodging Facilities - Content

- (1) The symbol required in Section 25604(a)(1).
- (2) The word "**WARNING**" in all capital letters and bold print.
- (3) For exposures to listed carcinogens, the words, "Entering this area can expose you to a chemical [or chemicals] known to the State of California

to cause cancer. For more information go to www.P65Warnings.ca.gov/environmental."

(4) For exposures to listed reproductive toxicants, the words, "Entering this area can expose you to a chemical [or chemicals] known to the State of California to cause birth defects or other reproductive harm. For more information go to www.P65Warnings.ca.gov/environmental."

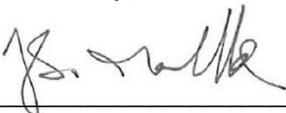
(5) For exposures to listed carcinogens and reproductive toxicants, the words, "Entering this area can expose you to a chemical [or chemicals] known to the State of California to cause cancer and birth defects or other reproductive harm. For more information go to www.P65Warnings.ca.gov/environmental."

(6) Where the name or names of chemicals are required to be included in the warning pursuant to Section 25602, or the noticing party wishes to include the name or names of other chemicals, the words, "Entering this area can expose you to a chemical [or chemicals] such as [name or names of chemical or chemicals] that is [are] known to the State of California to cause [cancer or birth defects or other reproductive harm or cancer and birth defects or other reproductive harm]. For more information go to www.P65Warnings.ca.gov/environmental."

(7) In the event that the hotel other transient lodging establishment elects to provide required warning information, and/or additional information, the following wording: For additional information regarding specific exposures, a brochure [or similar document] is available at the registration desk or from a designated staff person.

CH&LA very much appreciates this opportunity to express its thoughts, concerns, and recommendations regarding the Proposed Regulations to OEHHA, and we stand ready to work with, and assist, OEHHA in the finalization and adoption of the Proposed Regulations.

Sincerely,



Lynn S. Mohrfeld, CAE
President & CEO, California Hotel & Lodging Association

¹ Recreational vehicle parks are governed by the Recreational Vehicle Park Occupancy Law (Civil Code Sections 799.20, *et seq.*). Health and Safety Code Section 18010 defines "recreational vehicle" to include (a) A motor home, travel trailer, truck camper, or camping trailer, with or without motive power, designed for human habitation for recreational, emergency, or other occupancy ... (b) A park trailer, as defined in [Health and Safety Code Section 18009.3." (Emphasis added).

² For example, Civil Code Section 1866, which is one of the statutes that pertain specifically to hotels, also covers a great many camps, campsites, and operations of the type discussed below. Thus, those establishments are deemed to be hotels. For example, the Civil Code gives to the operators of special occupancy parks the same rights and obligations that apply to traditional hotels with respect to holdover guests, minors, and innkeeper's liens. As noted above, "special occupancy parks" are defined to mean a recreational vehicle park, temporary recreational vehicle park, incidental camping area, or tent camp. But the operative language in Civil Code Section 1866 dealing with the rights and obligations of special occupancy parks expressly applies also to campsites, camping cabins, lots (which also cover tents, camp cars, and camping parties, or other rental units.

Therefore, to the extent that particular campsites are open to the public generally and operate on the same basis as a hotel, they will be treated as hotels for many purposes. For example, the law pertaining to the transient occupancy tax makes it clear that some types of campsites and similar establishments are subject to the transient occupancy tax ("hotel tax"). (See Revenue and Taxation Code Sections 7280 and 7281).

³ Health and Safety Code Section 25249.11(b); Title 27, CCR, Section 25201(h).

⁴ § 25607.17 Warnings for Specific Environmental Exposures

* * *

(c) Apartments, Hotels and other Lodging Facilities – Method of Transmission

- (1) The warning message specified in subsection (d) shall be provided at each point of entry to the building on an 8 ½-by-11 inch sign in a print font no smaller than 45-point type, placed so that it is readable and conspicuous to individuals before they enter the premises.
- (2) Hotels and other lodging facilities must also comply with the warning methods and content specified for retail sellers of consumer products, alcoholic beverages and foods where such exposures occur on the premises.

(d) Apartments, Hotels and other Lodging Facilities - Content

- (1) The international health hazard symbol  .
- (2) The word "**WARNING**" in all capital letters and bold print.
- (3) The words "Entering these premises can expose you to varying levels of chemicals such as lead, formaldehyde and vehicle exhaust that are known to the State of California to cause cancer, birth defects or other reproductive harm. Contact building management for more information

about these exposures and how to reduce or avoid them. For additional information go to www.P65Warnings.ca.gov.”

- (4) Supplemental information such as a pamphlet or other method for the consumer to obtain additional information concerning the exposure may be provided, but shall not be substituted for the warning methods described in this section. In no case shall such additional information dilute or negate the warning provided pursuant to Health and Safety Code section 25249.6.

⁵ Senate Bill 1269 did not solve the Prop. 65 claims and lawsuits, and there were subsequent legislative amendments to Health and Safety Code Section 25249.7 to address these abuses: SB 471 (Chap. 578, Statutes of 2001); SB 1572 (Chapter 323, Statutes of 2002); SB 600 (Chap. 62, Statutes of 2003); and, most recently, AB 227 (Chap. 581, Statutes of 2013). A review of the number of Prop. 65 notices filed year-by-year and the annual settlements reported to the Attorney General reveals that what was once a cottage industry for plaintiffs’ lawyers has turned into a mansion industry.

⁶ Health and Safety Code Section 25249.6 (“Required Warning Before Exposure To Chemicals Known to Cause Cancer Or Reproductive Toxicity”):

No person in the course of doing business shall knowingly and intentionally expose any individual to a chemical known to the state to cause cancer or reproductive toxicity without first giving clear and reasonable warning to such individual, except as provided in Section 25249.10. (Emphasis added.)

⁷ Health and Safety Code Section 25102(n). Laypersons understand the concept of “negligence”: a failure to take proper care in doing something. In a legal context, it is a failure to fulfill one’s duty to exercise reasonable care in a given situation.

This illustrates the frustration businesses have in trying to assess whether they are required to provide warnings under Prop. 65. More specifically, determining whether a given act or omission is “proper” or meets the duty to exercise “reasonable care” are questions for the trier of fact in civil litigation, and these determinations are fact-specific and are made on a case-by-case basis with the burden of proof on the defendant in Prop. 65 cases. Virtually no California business faced with a claim that it failed to provide a clear and reasonable warning in a given situation will want, or be able, to litigate this issue.

⁸ Health and Safety Code Section 25249.11(c).

⁹ Title 27, CCR, Section 25102(i): “Expose” means to cause to ingest, inhale, contact via body surfaces or otherwise come into contact with a listed chemical. An individual may come into contact with a listed chemical through water, air, food, consumer products and any other environmental exposure as well as occupational exposures.

¹⁰ Health and Safety Code Section 25298.10(c) provides that no warning is required under Prop. 65 when it can be shown that the exposure in question:

...poses no significant risk assuming lifetime exposure at the level in question for substances known to the state to cause cancer, and that the exposure will have no observable effect

assuming exposure at one thousand (1000) times the level in question for substances known to the state to cause reproductive toxicity, based on evidence and standards of comparable scientific validity to the evidence and standards which form the scientific basis for the listing of such chemical pursuant to subdivision (a) of Section 25249.8. In any action brought to enforce Section 25249.6, the burden of showing that an exposure meets the criteria of this subdivision shall be on the defendant. (Emphasis added.)

¹¹ See Health and Safety Code Section 25248.9(b):

Section 25701(b): A chemical is known to the state to cause cancer or reproductive toxicity within the meaning of this chapter if in the opinion of the state's qualified experts it has been clearly shown through scientifically valid testing according to generally accepted principles to cause cancer or reproductive toxicity, or if a body considered to be authoritative by such experts has formally identified it as causing cancer or reproductive toxicity, or if an agency of the state or federal government has formally required it to be labeled or identified as causing cancer or reproductive toxicity.

¹² A level of exposure to a listed chemical, assuming daily exposure at that level, shall be deemed to pose no significant risk provided that the level is determined:

- (1) By means of a quantitative risk assessment that meets the standards described in Section 25703;
- (2) By application of Section 25707 (Routes of Exposure); or
- (3) By one of the following, as applicable:
 - (A) If a specific regulatory level has been established for the chemical in question in Section 25705, by application of that level.
 - (B) If no specific level is established for the chemical in question in Section 25705, by application of Section 25709 (Exposure to Trace Elements) or 25711 (Levels Based on State or Federal Standards) unless otherwise provided.

¹³ Section 25801: A level of exposure to a listed chemical shall be deemed to have no observable effect, assuming exposure at one thousand times that level, provided that the level is determined:

- (1) By means of [a quantitative] assessment that meets the standards described in Section 25803 to determine the maximum dose level having no observable effect, and dividing that level by one thousand (1,000) to arrive at the maximum allowable dose level, or
- (2) By application of a specific regulatory level for the chemical in question as provided in Section 25805.

¹⁴ OEHHA's FAQs do not define the term "qualified professional," nor is the term defined in the Current or Proposed Regulations. One can assume that this would require someone with the credentials sufficient to be characterized as a "qualified scientist," as defined in proposed Health and Safety Code Section 25249.11(c) of Assembly Bill 543, which is

pending before the California Legislature at this time:

(c) "Qualified scientist" means a person who meets all of the following requirements:
(1) He or she has completed a masters, doctoral, or medical doctor degree and has experience in an area specializing in any of the following:

- (A) Epidemiology
- (B) Oncology
- (C) Pathology
- (D) Medicine
- (E) Public health
- (F) Statistics.
- (G) Biology
- (H) Toxicology
- (I) Developmental toxicology
- (J) Reproductive toxicology
- (K) Teratology
- (L) Environmental chemistry
- (M) Fields related to subparagraphs (A) to (L), inclusive...

¹⁵ CH&LA submits that obtaining an "interpretive guideline" or a "safe use determination" under Sections 25203 and 25204 of the Current Regulations to determine whether there is a "significant risk" is so complex and costly that only a relative handful of businesses will be able to utilize these methodologies. They are simply not practical for the vast majority of businesses have or that have to comply with Prop. 65.

¹⁶ Unless otherwise indicated, Section references from this point on are to the Proposed Regulations.

¹⁷ This conclusion derives from the following:

- Section 25605, which describes the permitted "Methods of Transmission" for environmental exposure warnings, sets forth in subdivision (a)(1) the specifics for warning signs as follows: "A sign posted at all public entrances to the affected area in no smaller than 72-point type that clearly identifies the area for which the warning is being provided." (Emphasis added.)
- Section 25602(a) of the Current Regulations states that "Affected area" means the area in which an exposure to a chemical known to the state to cause cancer or reproductive toxicity is at a level that requires a warning. (Emphasis added.)
- Section 25600.1(a): "Affected area" means the area in which an exposure to a chemical known to the state to cause cancer or birth defects or other reproductive harm is reasonably calculated to occur at a level that requires a warning. (Emphasis added.)

¹⁸ "Necessity" means the record of the rulemaking proceeding demonstrates by substantial evidence, the need for regulation to effectuate the purpose of the statute, court decision, or other provision of law that the regulation implements, interprets, or makes specific taking into account the totality of the record.

"Authority" means the provision of law, which permits or obligates agency to adopt, amend or repeal a regulation.

"Clarity" means written or displayed so that the meaning of regulations will be easily understood by those persons directly affected by them. (Emphasis added.)

"Consistency" means being in harmony with, and not in conflict with the contradictory to, existing statutes, court decisions, or other provisions of law.

¹⁹ See Title 1, CCR, Section 10:

(a) In reviewing the rulemaking record for compliance with subsection (b), OAL shall not dispute the decision of a rulemaking agency to adopt a particular regulatory provision when the information provided as required by subsection (b) is also adequate to support one or more alternative conclusions.

(b) In order to meet the "necessity" standard of Government Code section 11349.1, the record of the rulemaking proceeding shall include:

(1) A statement of the specific purpose of each adoption, amendment, or repeal; and

(2) Information explaining why each provision of the adopted regulation is required to carry out the described purpose of the provision. Such information shall include, but is not limited to, facts, studies, or expert opinion. When the explanation is based upon policies, conclusions, speculation, or conjecture, the rulemaking record must include, in addition, supporting facts, studies, expert opinion, or other information. An "expert" within the meaning of this section is a person who possesses special skill or knowledge by reason of study or experience which is relevant to the regulation in question. (Emphasis added.)

SOURCES OF CHEMICAL EXPOSURE

California's Proposition 65 lists over 800 chemicals known to the State of California to cause cancer, and/or birth defects or other reproductive harm. The law requires businesses to provide a warning prior to knowingly and intentionally causing an exposure to any of these chemicals when the exposure is over a very low level. While many exposures are associated with industrial activities and chemicals, everyday items and even the air we breathe routinely contain many of these chemicals. This brochure provides information regarding exposures to these chemicals that may occur in this establishment. Though we do not have information specific to this establishment, we consulted experts in this field to tell us which chemicals exposures might occur in or around similar establishments.

The regulations implementing Proposition 65 require warnings for various circumstances. For example, some warnings you may see in this establishment include the following:

GENERAL -- Warning: This Facility Contains Chemicals Known To The State of California To Cause Cancer, And Birth Defects Or Other Reproductive Harm.

FOOD AND BEVERAGE -- Warning: Chemicals Known To The State of California To Cause Cancer, Or Birth Defects Or Other Reproductive Harm May Be Present In Foods Or Beverages Sold Or Served Here.

ALCOHOL -- Warning: Drinking Distilled Spirits, Beer, Coolers, Wine, And Other Alcoholic Beverages May Increase Cancer Risk, And, During Pregnancy, Can Cause Birth Defects.

HEALTH INFORMATION -- Pregnant women, nursing mothers, women trying to become pregnant, those with small children, and others wanting more information about food products can obtain additional information at the U.S. Food and Drug Administration website at: www.cfsan.fda.gov. For more information on Fish and Seafood, you can also call the FDA at 1-888-SAFEFOOD (1-888-723-3366).

continued from inside

PEST CONTROL AND LANDSCAPING.

Pest control and landscaping products used at this facility to control insects and weeds contain resmethrin, mycobutonil, triforine and arsenic trioxide which are known to cause cancer and/or birth defects or other reproductive harm.

Certain roofing materials, if present, contain Proposition 65-listed chemicals, including asbestos and lead, known to the State of California to cause cancer. Certain pavement work, if present, contains Proposition 65-listed chemicals, including 5-methylchrysene, benz[a]anthracene, chrysene, formaldehyde, and toluene diisocyanate, known to the State of California to cause cancer.

Paints contain benzene, formaldehyde, and crystalline silica (airborne particles of respirable size), chemicals known to the State of California to cause cancer, and also ethylbenzene and toluene, chemicals known to the State of California to cause cancer and birth defects or other reproductive harm.



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PROPOSITION 65
WARNING

CALIFORNIA'S PROPOSITION 65 (Safe Drinking Water and Toxic Enforcement Act of 1986) requires businesses with 10 or more employees to provide warnings prior to exposing individuals to chemicals known to the State to cause cancer, and/or birth defects or other reproductive harm.

This brochure provides you with information on what chemicals you may be exposed to, as required by Proposition 65.

WARNING

This Facility Contains Chemicals Known To The State of California To Cause Cancer And/Or Birth Defects Or Other Reproductive Harm.

SECOND HAND TOBACCO SMOKE AND TOBACCO PRODUCTS.

Tobacco products and tobacco smoke and its by-products contain many chemicals that are known to cause cancer, and birth defects or other reproductive harm. Smoking is permitted in certain guest rooms and/or certain common areas of this establishment.

FURNISHINGS, HARDWARE, AND ELECTRICAL COMPONENTS.

Room furnishings and building materials contain formaldehyde. Furniture, foams, brass keys (if in use), electrical power cords, carpeting, artificial turf, carpet padding, wall coverings, wood surfaces, and vinyl, contain a number of Proposition 65-listed chemicals, including lead and formaldehyde, known to the State of California to cause cancer, and/or birth defects or other reproductive harm. Foams and foam padding used in furniture or bedding contain tris (1,3-dichloro-2-propyl) phosphate, a chemical known to cause cancer. Certain molds, if present, contain Proposition 65-listed chemicals, including sterigmatocystin, known to cause cancer. Their presence can lead to exposures requiring a warning.

Gaming chips (if in use) contain lead and lead compounds, chemicals known to the State of California to cause cancer and birth defects and other reproductive harm. Plastic and vinyl materials used in a wide variety of products contain phthalates (including BBP, DEHP, DIDP, DINP, DBP and DnHP) which are known to cause cancer and birth defects or other reproductive harm.

COMBUSTION SOURCES.

Combustion sources such as boilers, gas stoves, fireplaces, wood pellets, and sterno cans contain or produce a large number of Proposition 65-listed chemicals, including acetaldehyde, benzene, wood dust and carbon monoxide, known to the State of California to cause cancer, and/or birth defects or other reproductive harm and are found in the air of this establishment. Any time organic matter is burned, Proposition 65-listed chemicals are released into the air.

SWIMMING POOLS, HOTTUBS, TOILETRIES AND SPAS.

The use and maintenance of a variety of recreational activities and facilities such as swimming pools and hot tubs where chlorine and bromine are used in the disinfecting process can cause exposures to chloroform, bromodichloromethane and bromoform which are chemicals known to cause cancer. Soaps, shampoos, shower gels and skin creams contain cocamide diethanolamine which causes cancer. Sunscreens and lotions may also contain benzophenone and titanium dioxide (airborne, unbound particles of respirable size) which cause cancer.

FOODS AND BEVERAGES.

Chemicals known to the State of California to cause cancer, or birth defects or other reproductive harm may be present in foods or beverages sold or served here. Foods and beverages are sold or provided at this establishment ~ in bars, lounges, eating areas, mini bars, and via guest room services. Drinking alcoholic beverages of any kind may increase cancer risks, and, during pregnancy, can cause birth defects. Foods such as french fries and potato chips cooked in oil at high temperatures can produce Proposition 65-listed chemicals such as acrylamide, which is known to cause cancer and reproductive harm. Coffee also contains acrylamide and lead. Broiling, grilling, and barbecuing fish and meats can produce Proposition 65-listed chemicals such as benzo(a)-pyrene, which is known to cause cancer. 4-methylimidazole which causes cancer is present in drinks with caramel color. Nearly all fish and seafood contain some amount of mercury and related compounds, chemicals known to cause cancer, and birth defects or reproductive harm. Certain fish contain higher levels than others. Pregnant and nursing women, women who may become pregnant and young children should not eat swordfish, shark, king mackerel or tilefish. They also should limit their consumption of other fish, including tuna. Ground beef products contain polychlorinated biphenyls and polychlorinated dibenzo-p-dioxins, chemicals known to cause cancer and birth defects or other reproductive harm. Cooked chicken products contain PhiP (2-Amino-1-methyl-4-phenylimidazole] 4,5-b]pyridine), a chemical known to the State of California to cause cancer. Fruit juices, cereals, canned or jarred fruits and vinegar purchased from third parties contain lead. Rice contains lead, cadmium and arsenic, which can cause cancer and reproductive harm.

Some seaweed snacks, cocoa powder and vegan protein contain cadmium known to cause cancer and birth defects or other reproductive harm. Breads contain urethane (ethyl carbamate) known to cause cancer and reproductive harm. Additionally, leaded crystal in which beverages are served contains lead, which is known to the State to cause cancer and/or birth defects or other reproductive harm.

Additionally, glassware, bottles (including soda bottles) and ceramic ware with colored artwork or designs on the exterior contain lead, lead compounds, and cadmium, which are known to the State of California to cause cancer and birth defects or other reproductive harm.

CERTAIN PRODUCTS USED IN CLEANING AND RELATED ACTIVITIES.

Certain cleaning products used for graffiti removal and spot and stain lifters contain chlorinated solvents including perchloroethylene. Urinal odor cakes contain paradichloro benzene which are paradichlorobenzene which is a Proposition 65-listed chemical known to cause cancer.

Certain cleaning solvents contain dichloromethane (methylene chloride) and trichloroethylene, and bleach contains chloroform, chemicals known to the State of California to cause cancer and reproductive harm.

ENGINE RELATED EXPOSURES.

The operation and fueling of engines, including automobiles, buses, vans, maintenance vehicles, recreational vehicles, and other small internal combustion engines are associated with this establishment's operations. Motor vehicle fuels and engine exhaust contain many Proposition 65-listed chemicals, including benzene, carbon monoxide and, for diesel engines, diesel exhaust, which are known to the State to cause cancer, and/or birth defects or other reproductive harm. In parking structures and garages, exhaust fumes can concentrate, increasing your exposure to these chemicals.

Continued on back



WARNING

Entering this area can
expose you to
chemicals such as
acrylamide, arsenic,

benzene, cadmium,
carbon monoxide,
chlorinated tris,
formaldehyde, lead,
mercury, methylene

chloride, phthalate[s]
known to the State of
California to cause
cancer and birth
defects or other

reproductive harm.

For more information

go to

www.P65Warnings.c

a.gov/environmental.