

California Council for Environmental and Economic Balance

101 Mission Street, Suite 805, San Francisco, California 94105
415-512-7890 phone, 415-512-7897 fax, www.cceeb.org

April 8, 2015

Monet Vela
Office of Environmental Health Hazard Assessment
P.O. Box 4010
1001 I Street
Sacramento, CA 95812-4010

Via Electronic Transmission: P65Public.comments@oehha.ca.gov

RE: Proposed Clear & Reasonable Warning Regulations

Dear Ms. Vela,

On behalf of the members of the California Council for Environmental and Economic Balance (CCEEB), we appreciate the opportunity to offer comments and concerns regarding the Office of Environmental Health Hazard Assessment's ("OEHHA") Notice of Proposed Rulemaking to Article 6 in Title 27 of the California Code of Regulations pursuant to the Safe Drinking Water and Toxic Enforcement Act ("Proposition 65"). In addition to the comments and concerns outlined in this letter, CCEEB also endorses the comments submitted by the CalChamber-led coalition, including the economic analysis the Coalition commissioned regarding the proposed revisions to the Proposition 65 regulations. CCEEB is a coalition of business, labor, and public leaders that works together to advance strategies to achieve a sound economy and a healthy environment. Founded in 1973, CCEEB is a non-profit and non-partisan organization.

We appreciate this opportunity to comment on OEHHA's proposal to amend the Proposition 65 warning regulations; however, we are concerned with the impression provided in OEHHA's Initial Statement of Reasons (ISOR) that the revisions would greatly benefit the business community. We acknowledge the work undertaken to craft industry-specific warnings and appreciate OEHHA's efforts to work with those affected industries. Unfortunately, however, the characterization of the overarching revisions as ones that will make compliance simpler, will help reduce frivolous litigation, and have no economic impact are unsubstantiated and we are concerned many of the revisions will in fact have exactly the opposite effect that OEHHA has stated in the ISOR.

According to OEHHA, the revised proposal is intended to provide "non-mandatory" and "voluntary" guidance for the methods and content included in warnings thereby allowing businesses to warn via any method they wish to employ as long as they are able to defend such warnings as "clear and reasonable (ISOR, p.13-14, p. 43)." In seeming contradiction, the ISOR suggest the revised regulation provides "more specificity regarding the minimum elements for providing "clear and reasonable" warnings for exposures (ISOR, p. 41)..." This is concerning for the business community as it endeavors to be in compliance, but what compliance means for the purpose of "clear

and reasonable” is unclear. Further, the Brown Administration and OEHHA from the outset indicated their main goals were to reduce frivolous litigation associated with Proposition 65 and to improve the value of warnings that are issued. Unfortunately, OEHHA’s proposal does not meet this goal.

As a matter of fact, currently the issue surrounding litigation isn’t typically due to what is contained within a warning. Rather, it is more closely tied to a business’ decision whether or not to provide a warning. This proposed revision would alter the content requirements such that the approach to litigation would certainly shift to content as the revisions would require, as an example, warnings to specify one or more of twelve chemicals.

As it relates to economic impact considerations, OEHHA concludes that the revised regulation would have no economic impact on California businesses. Regrettably, OEHHA reached this conclusion based on the flawed perspective that the revisions would not impose any new requirements on businesses because it provides non-mandatory guidance and a voluntary safe harbor approach for warnings required under Proposition 65 that businesses can choose to follow (ISOR, p. 43). To the contrary, based on the revisions, businesses will be forced to replace their existing warnings to include the new “minimum elements” in the revised regulation in order to be within the safe harbor requirements. Absent that approach, they would have to spend resources to work with OEHHA to craft their own industry/product-specific warning. To be clear, there are indeed costs associated with replacing existing warnings – in addition to being prepared to defend them against private enforcers. We would urge OEHHA to reconsider the economic impacts associated with its revised regulation and to conduct a meaningful economic analysis of the proposal.

In terms of specific concerns, we would offer the following specific comments on behalf of CCEEB members – in addition to our endorsement of the CalChamber-led Coalition letter that is more detailed.

Section 25600(a): General

This section provides that Article 6, subsections 1 and 2 apply when a clear and reasonable warning is required under California Health & Safety Code Section 25249.6; however, unlike the existing regulations “clear and reasonable” does not have any associated interpretive guidance. Without any clear guidance as to what is deemed “clear and reasonable,” businesses will not be able to confidently rely on it going forward and warnings that have met the “clear and reasonable” may no longer be deemed compliant. Further, without clarity as to what is deemed “clear and reasonable” businesses will be forced to either use the new “non-mandatory” safe harbor language or risk litigation as to whether the alternative warnings used are “clear and reasonable” given there is no clarity around what is “clear and reasonable.”

We urge OEHHA to reinstate the existing regulation’s language regarding what is deemed “clear and reasonable” to provide clarity and to help protect against increased frivolous litigation.

Grandfathering

While OEHHA includes a brief discussion in the ISOR about Court Approved Settlements and its reasoning for not including a grandfathering provision within the

proposed revision to the regulation, CCEEB and its members are concerned that the discussion is not sufficient. OEHHA acknowledges that companies subject to a court order must comply with the court order, but OEHHA does not make clear in the proposed revised regulation that court approved warnings and settlements are considered “clear and reasonable” for the purposes of Proposition 65.

To address these concerns, we urge OEHHA to include the following verbiage in Section 26000:

Nothing in this Article shall affect warnings for specific exposures that are approved by courts as compliant with the Act or require that such warnings be revised.

Further, we urge OEHHA to include a clear, explicit statement in the Final Statement of Reasons that all court approved warnings can be utilized and deemed “clear and reasonable” for the purpose of compliance regardless of the proposed revisions to the regulation. Additionally, businesses should not be required to petition OEHHA to adopt Proposition 65 warnings previously approved by a court as meeting the state’s “clear and reasonable” requirement through another costly rulemaking process.

Section 25602: Chemicals Included in the Text of a Warning

OEHHA has identified twelve chemicals/chemical categories that must be specifically identified in a safe harbor warning. This requirement will undoubtedly lead to increased litigation, going directly against the Administration and OEHHA’s stated goal of reducing frivolous litigation related to Proposition 65.

The chemicals/chemical categories listed have been included with no clear scientific criteria established in the regulation to decide what chemicals/chemical categories should be listed. Instead, the list is derived from a variety of non-science based factors, much of which reflects a chemical du jour approach to the listings. Further, determining what chemicals/chemical categories need to be listed on the warning based on anticipated levels of exposure can be very difficult to assess, as previously acknowledged by OEHHA. In order to determine what chemical/chemical category listing would be required, a company would necessarily have to go through costly exposure assessments in order to substantiate a decision not to identify one of the twelve listed chemicals/chemical categories. This de facto mandate will impose significant economic challenges for many companies, especially small businesses, who will be forced to spend tens of thousands of dollars to assess whether or not to list a chemical/chemical category, depending on the product, the chemical, and whether OEHHA has established a No Significant Risk Level (NSRL) or Maximum Acceptable Dosage Level (MADL) for the chemical. Not only is this incredibly problematic, but the ISOR is clear that the list of chemicals/chemical categories may change at any time. Without clear, defined scientific criteria for listing, it will be next to impossible for businesses to anticipate what chemicals may be added in the future and as such make it difficult for a business to consider such chemical/chemical category listings and conduct appropriate exposure assessments in its research and development process.

Further, a company may determine it needs to list for one chemical based on the chemical threshold, but not for another that is under the level requiring a warning. Despite providing a warning in compliance with the regulation, the company may

nonetheless be sued for failing to identify the low level chemical – leading to increased litigation and significant costs for the company.

The only potentially workable approach to this section would be to incorporate the specific product content levels approved by a court into the regulation explicitly. In doing so, it would provide clarity for companies as to what the threshold is that requires a listing and when it is not required because of de minimis, trace or generally being incorporated at below the court-approved threshold.

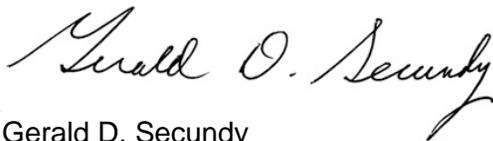
Conclusion

As previously noted, in addition to the specific comments offered in this letter we endorse the comments submitted by the CalChamber-led Coalition. As clearly articulated between CCEEB's comments contained herein and those of the Coalition, the proposed revised Proposition 65 regulation is flawed and incredibly problematic. Despite OEHHA's characterization that the revisions will result in a decrease in litigation and ease compliance costs without any financial impact on California businesses, the proposal will in fact cause a significant increase in frivolous litigation and increase compliance costs without meaningful improvements in the quality of product, public and workplace warnings.

In this regard, we would urge OEHHA to substantially rework the proposed revised regulation and ISOR, conduct a more meaningful economic analysis, undertake efforts to better define when a Proposition 65 warning is necessary, and recirculate the proposal for another round of robust public comment before moving forward with any effort to finalize revisions to the current warning regulation.

Thank you for the opportunity to comment. Should you have questions, please contact CCEEB project manager Dawn Koepke at dkoopke@mchughgr.com or (916) 930-1993.

Sincerely,



Gerald D. Secundy
CCEEB President



Dawn Koepke
CCEEB Water, Waste & Chemistry
Project Manager

cc: Matt Rodriguez, Secretary, California Environmental Protection Agency
George Alexeeff, Director, OEHHA
Alan Hirsch, Chief Deputy Director, OEHHA
Carol Monahan-Cummings, Chief Counsel, OEHHA
Mario Fernandez, Counsel, OEHHA
Gina Solomon, Deputy Secretary for Science & Health, Cal/EPA
Tara Dias-Address, Deputy Secretary for Legislative Affairs, CalEPA
Nancy McFadden, Executive Secretary, Office of the Governor
Dana Williamson, Cabinet Secretary, Office of the Governor
Cliff Rechtschaffen, Senior Advisor, Office of the Governor
Kish Rajan, Director, Governor's Office of Business & Economic Development