April 8, 2015

Monet Vela
California Environmental Protection Agency
Office of Environmental Health Hazard Assessment
PO Box 4010
1001 I Street
Sacramento, CA 95812

Sent via E-mail: p65public.comments@oehha.ca.gov

Subject: Clear and Reasonable Warnings Regulation

Dear Ms. Vela:

The Food and Agriculture Coalition ("Coalition") appreciates the opportunity to comment on the Office of Environmental Health Hazard Assessment's ("OEHHA's") proposed rule regarding Clear and Reasonable Warnings. The Coalition agrees with the comments submitted by the California Chamber of Commerce ("Chamber") and therefore has signed on as part of its broader letter. However, we would like to highlight a number of issues that specifically impact the food and agriculture industry.

In a broader context, the Coalition is disappointed that the Administration has not pursued many of its original goals of Prop. 65 reform which were suggested in 2013.

These goals included (but were not limited to):

- Cap or limit attorney's fees in Proposition 65 cases.
- Require stronger demonstration by plaintiffs that they have information to support claims before litigation begins.
- Require greater disclosure of plaintiff's information.
- Set limits on the amount of money in an enforcement case that can go into settlement funds in lieu of penalties.
- Provide the State with the ability to adjust the level at which Proposition 65 warnings are needed for chemicals that cause reproductive harm.
- Require more useful information to the public on what they are being exposed to and how they can protect themselves.

We strongly believe that without litigation reform, plaintiff's attorneys will find other ways to pursue litigation under Prop. 65. Additionally, the so-called "naturally occurring" exemption for some chemicals found in the food supply needs to be significantly improved to be more useful for the food industry. While we appreciate OEHHA's attempts at improving the existing regulation, absent fixes to these two issues, the reforms are not very meaningful.

In regards to the proposed regulation, the Coalition disagrees with OEHHA's assessment that the suggested language will reduce litigation and have a minimal economic impact on business. Furthermore, the regulations also create more confusion for food producers and potentially consumers. As an example, the food and agriculture industry is still not clear on what food products have to participate in Prop. 65. The United States Department of Agriculture (USDA) and Food and Drug Administration (FDA) have jurisdiction on food labeling issues as it pertains to a number of food products. Unfortunately, there has been little clarity on this specific issue and the new regulations just offer more questions than answers in this regard.

Additionally, we are highly concerned as to what impacts these regulations will have on global agreements in international markets. According to UC Davis's Agricultural Issues Center in 2012, California agriculture exported over $18 billion of products to over 100 countries around the world. Some food companies may not label food products that are meant for sale specifically in California due to complexities within food distribution systems. Therefore, these warnings could create alarm in other states and countries on healthy and nutritious foods. Countries that already have protectionist policies in place would likely use Prop. 65 to add further testing or turn awa products that previously did not have any problems. As a result, the economic impacts for foods that have to provide warnings could be significant.

<u>Proposed Section 25600 (d)</u>
Subdivision (d) states that a person may provide supplemental information to the warning so long as the information does not "contradict, dilute, or diminish the warning."

Because the draft does not define many terms, including what information that is "supplemental to the warning" and language that may "contradict, dilute or diminish the warning," the Coalition is highly concerned that this language could increase litigation against the food industry.

The food industry invests millions of dollars in health and nutrition research to determine and promote the health benefits of many of its products. Examples include antioxidant levels in berries, improving bone health through the intake of dairy products and maintaining healthy cholesterol levels through the consumption of certain nuts. The Coalition is concerned that these statements on food packages could trigger litigation under the provisions outlined above regarding diluting or diminishing the warning. This is a potential moneymaker for private enforcers. We respectfully request OEHHA delete the qualifying language about verbiage that could "contradict, dilute or diminish the warning."

<u>Proposed Section 25600.2</u>
The Coalition supports language in this section that would make it the requirement of the retailer to provide the warning, so long as the manufacturer provides the necessary materials. Oftentimes, the agricultural community sells products without entirely knowing its final destination. Food sent to a distribution center outside of California could be easily returned to the state without input from the original seller. It is also unrealistic to expect farmers and food processors to create separate labeling and distribution channels for California-specific products. Many distribution chains are created by the retailers and would greatly increase the economic burden of Prop. 65 for food and agriculture.

We believe that contractual agreements between the retailers and food producers could cover an remaining issues regarding how retailers display the warnings. This change would be a significant improvement in the regulation as it currently stands. The regulations as currently proposed by OEHHA would not work on a variety of food packages and could also conflict with FDA regulations as to what information goes onto on-product labels. Therefore, we support this language.

Proposed Section 25602

The Coalition opposes the automatic listing of the 12 chemicals. The proposed listing of these chemicals is totally arbitrary and not based on science. We underscore the comments provided by the Chamber that the uncertainty as to when a business should warn, coupled with an aggressive climate of litigation, make it impossible to establish with scientific certainty that no exposure is occurring at levels requiring a warning. This issue becomes especially problematic for chemicals that are present in our environment and absorbed by agricultural products, with no mitigation practices to minimize exposure other than avoiding consumption altogether.

Proposed Section 25603:

The Coalition is pleased that OEHHA attempts to provide some flexibility in the ability to provide Prop. 65 warnings. As outlined throughout these comments and those of the Chamber, providing a warning comes with a number of issues. We encourage OEHHA to allow for flexibility wherever possible in this regulation.

Another potential solution could be providing the flexibility of allowing a food producer to utilize a QR code to provide the warning. This new technology allows for greater flexibility to provide additional information for food companies that wish to utilize it.

Proposed Section 25604:

The Coalition is opposed to the use of the word "WARNING" in 10-point font. The FDA has strict regulations regarding what information is included in product labels and this type of warning is inconsistent with those regulations i that they require potential allergens to be labeled underneath the nutrition label, with no other "intervening material" present on this panel. There are also specifications regarding fonts and other labeling issues. A brief description of these regulations can be found at this website:

http://www.fda.gov/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/LabelingNutrition/ucm064866.htm

Additionally, a 10-point type font is extremely large for small food product packages. Should a food company need to provide a warning for Prop. 65, it would be extremely problematic for hundreds of food products that are sold in smaller packages.

The suggested language by OEHHA that states "Consuming this product can expose you to a chemical…" is not correct. For chemicals that are naturally occurring, there is no way to know whether or not the chemical is even in the food product, let alone whether or not an exposure may happen as a result. Therefore, we request OEHHA delete the language stating, "can expose you to," and insert "may contain a chemical that." This statement is more factually correct and therefore more consistent with OEHHA's and the Governor's desires to prevent over-warning.

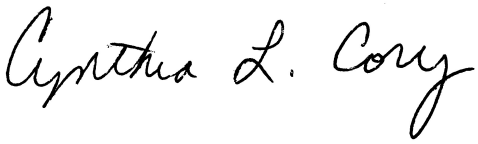
Proposed Sections 25608.1 and 25608.2:
Section 25608 addresses warnings on food products. Like warnings for consumer products, the proposed regulation requires that the warning be enclosed in a box absent any prohibition imposed by federal law. The boxing proposal could unnecessarily confuse and mislead consumers by suggesting that the risk to the individual from exposure is of greater magnitude than it actually is. Similarly, boxing the warning may unintentionally elevate its importance over other mandated warnings or disclosures, thereby undermining their purpose. For these reasons, it makes sense to eliminate the boxing requirement for foods.

Like other consumer products, the proposed regulation would also require food warnings to appear in a foreign language where other labeling is provided in that language. For the reasons discussed above, the foreign language requirement is overboard and problematic, and particularly so with regard to foods where space limitations can be acute. OEHHA has acknowledged the need for warnings to have nuance and context. As a result, the proposed regulations should be revised to only require a food warning in an alternate language where other health-related warnings on a label are given in multiple languages.

In closing, the Food and Agriculture Coalition urges the Administration to pursue additional avenues of Prop. 65 reform, including litigation reform and improvements to the "naturally occurring" exemption, in addition to the aforementioned recommendations regarding the proposed regulation on Clear and Reasonable Warnings. This package of reforms would create more meaningful changes for producers and consumers. Thank you for the opportunity to comment. We look forward to working with you throughout this regulatory process.

Sincerely,

Emily Rooney
Agricultural Council of California



Cynthia Cory
California Farm Bureau Federation

Trudi Hughes
California League of Food Processors

Matthew Allen
Western Growers Association