



Western States Petroleum Association
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Catherine H. Reheis-Boyd
President

April 8, 2015

Via E-Mail (to P65Public.Comments@oehha.ca.gov)

Ms. Monet Vela
Office of Environmental Health Hazard Assessment
P.O. Box 4010
Sacramento, California 95812-4010

Re: Western States Petroleum Association's Comments on Proposed Amendments to Proposition 65 Clear and Reasonable Warning Regulations, and Lead Agency Regulations

Dear Ms. Vela:

The Western States Petroleum Association ("WSPA") appreciates the opportunity to provide comments on the Office of Environmental Health Hazard Assessment's ("OEHHA") proposed regulations governing "clear and reasonable warnings" under Proposition 65 ("Prop 65") (proposed repeal and adoption of Title 27, Article 6 of the California Code of Regulations ("C.C.R.")), and proposed regulations establishing a "lead agency website" providing supplemental information related to Prop 65 exposures and chemicals (proposed 27 C.C.R. § 25205). On June 13, 2014, WSPA submitted comments to OEHHA on a previous March 2014 draft of proposed revisions to the "clear and reasonable warning" regulations. Because some of the issues continue to apply to the currently proposed regulations, except as specifically modified herein, WSPA incorporates these June 2014 comments herein by reference. WSPA also reserves the right to supplement these comments as additional or different information is made available to the public about the proposed regulations.

As OEHHA knows, WSPA has been actively engaged with OEHHA in the ongoing consideration of proposed revisions to the Prop 65 regulations since Governor Brown's May 2013 call for Prop 65 reforms to designed to "end[] frivolous 'shake-down' lawsuits" and "improv[e] how the public is warned." Governor Edmund G. Brown, Jr. Press Release, "Governor Brown Proposed to Reform Proposition 65," May 7, 2013 ("Governor's Press Release"). We were especially pleased to see OEHHA incorporate some of the revisions we recommended in our June 2014 comments relating to restoration of the "safe harbor" provisions, preservation of the option for businesses to publish environmental exposure warnings in quarterly newspaper notices, and removal of the misleading Globally Harmonized System (GHS) pictogram, among other things.

Nevertheless, WSPA continues to believe that the Prop 65 program would greatly benefit from regulatory changes that simplify and streamline the warning process, make regulatory compliance more predictable and understandable for regulated parties, remove incentives for frivolous litigation, and ensure OEHHA's wide dissemination of publicly available and accurate information about Prop 65 chemicals.

1415 L Street, Suite 600, Sacramento, California 95814
(916) 498-7752 • Fax: (916) 444-5745 • Cell: (916) 835-0450
cathy@wspa.org • www.wspa.org

I. “Clear and Reasonable Warning” Regulations

As an initial matter, WSPA believes that the two-year lead time OEHHA has proposed in the “clear and reasonable warning” regulations is not sufficient time for some businesses to overhaul existing Prop 65 warnings and procedures that may have been in place for decades. *See* proposed 27 C.C.R. § 25600(b). Warnings on thousands of products and facilities statewide will need to be revised in light of the new regulations, including a number of Attorney General-approved Prop 65 warnings WSPA members have relied on for many years. Given the wide breadth of the proposed changes, and their likely impact on regulated businesses, WSPA believes that a minimum *three*-year period should be provided for businesses to evaluate their warning programs, implement new warning procedures and, as necessary, revise the businesses’ Prop 65 warnings.

One other preliminary correction should be noted at the outset. In proposed Section 25608.24, OEHHA appears to have made a typographical error by stating that warning signs on gas pumps at service stations must “us[e] the elements required in Section 25608.23. Section 25608.23 references warnings at industrial petroleum product facilities. The correct reference should be to Section 25608.25, which is the section addressing the content of warnings for “service stations and vehicle - repair facilities.”

A. The Restoration of “Safe Harbor” Protections is a Significant Improvement of the Proposed Rules, But Some Issues Remain

WSPA wholeheartedly supports OEHHA’s decision to preserve in the proposed regulatory amendments “safe harbor” language providing that a Prop 65 warning is *per se* “clear and reasonable” under Health & Safety Code Section 25249.6 “if the warning complies with all applicable requirements of this Article [6].” *See* Proposed 27 C.C.R. § 25601(a).

However, as discussed below, some of the concepts presented in the “safe harbor” regulations are too vague to provide businesses with certainty as to what actions are necessary to qualify for protection, or are not practical as currently worded. Those situations are described further below.

B. State-Approved Prop 65 Warnings Have Already Been Deemed “Clear and Reasonable” and Should Not Be Subject to Article 6

WSPA was disappointed to see that the revised draft of the “clear and reasonable warning” regulations still fails to recognize as *per se* “clear and reasonable” Prop 65 warnings approved by OEHHA or the state Attorney General (“AG”). As WSPA stated in its prior comments, warnings that have already been reviewed and approved by OEHHA or the AG provide an added measure of certainty to the public and regulated businesses alike that those warnings are indeed “clear and reasonable” under Prop 65 – perhaps even more than the regulatory “safe harbors” being proposed by OEHHA because of the *individualized* attention such approved warnings have received by the state. Stakeholders have justifiably relied on these state-approved warnings as a method for assuring compliance with the “clear and reasonable warning” requirements of Prop 65.

While the March 2014 version of the proposed regulations also failed to provide a safe harbor for state-approved warnings, it had previously proposed such protection for warnings embodied in “court-approved settlements.” *See* Pre-Regulatory Draft Initial Statement of Reasons, March 7, 2014 (“March 2014 ISOR”) at 8-9. The January 2015 Initial Statement of Reasons (“January 2015 Warnings ISOR”) on the revised proposed amendments now abandons this grandfathering of warnings in court-approved settlements, claiming that no such grandfathering is needed due to (1) “the non-mandatory, safe harbor approach” in the currently proposed

regulations, (2) “the fact that businesses who are parties to a settlement or judgment must comply with the provisions of the court’s order, regardless of whether the regulation states that fact,” and (3) “a non-party has the option of petitioning [OEHHA] to adopt warning content or methods specific to a product, chemical, or type of exposure . . . including warning methods or content contained in a court settlement.” January 2015 Warnings ISOR, p. 13.

As in the March 2014 ISOR, OEHHA provides no explanation in the January 2015 ISOR why a previous court or state (or even OEHHA) approval of a Prop 65 warning should somehow not be trusted by OEHHA as a reliable indicator that the warning is, indeed, “clear and reasonable.” The existence of other “non-mandatory, safe harbor[s]” in the proposed regulations does not provide any help for a business whose warning has already met the test of sufficiency from the state, AG or OEHHA itself, but which may not neatly fit any of the current “safe harbor” provisions. Nor do prior state-approved warnings have the benefit of a “court order” compelling their format or execution. And the availability of a discretionary “petition” process to have OEHHA adopt a determination to approve warning methods or content already previously approved by the state (or by OEHHA itself) is both a waste of resources and duplicative; the prior state approval of the warning is, itself, evidence that the warning is already “clear and reasonable.” Indeed, this process could force a business whose warning has already previously been approved by *OEHHA itself* to petition OEHHA again for a determination that the warning is, once again, “clear and reasonable.”

Providing a safe harbor for state-approved warnings has nothing to do with whether other avenues might exist in the regulations for those businesses to fight for recognition of their warnings. It is about recognizing and honoring the state determinations *already made* – after much careful review and analysis of the specific warnings involved – that such warnings are “clear and reasonable.” As WSPA pointed out in our prior comments, the purpose of the “clear and reasonable warning” regulations should not be to simply compel arbitrary changes in warnings where they are not reasonably required. State-approved warnings like WSPA’s that have been in place and highly effective for many years without dispute should be allowed to remain in place, rather than mandating costly and unnecessary removal of warnings that work. WSPA can see no benefit to that.

C. Requiring Disclosure of Certain Specific Chemicals in Warnings Will Not Necessarily Promote Accurate Information or Help Prevent Harmful Exposures

As we stated in our June 2014 comments, WSPA continues to believe that forcing regulated businesses to include in the Prop 65 warning, in order to gain “safe harbor” protection, the specific name or names of any chemicals appearing in a list of 12 chemicals provided in the regulations is arbitrary, burdensome, and does not make Prop 65 warnings more “clear and reasonable.” With the new requirement that warnings now contain a link to the lead agency website with a host of additional information on exposures under Prop 65, it is even more unclear how the mere addition of a chemical name (and only if it is one of the 12 listed chemicals) makes the warning more “clear and reasonable” to the average observer.

Indeed, mandating the inclusion in the Prop 65 warning of the specific chemical name(s) among the 12 listed in the proposed regulations could mislead the public into believing that these 12 chemicals – and any other chemical names OEHHA decides to mandate in the warning language in the future – somehow pose a heightened or unique exposure risk, due to their being specifically listed by name (as opposed to other Prop 65 chemicals not listed by name). In any event, WSPA is concerned that the Prop 65 statutes do not appear to vest OEHHA with any authority to require actual chemical names to make a particular warning “clear and reasonable” under Health & Safety Code Section 25249.6.

Including chemical names on a Prop 65 warning, even if limited to these 12 chemicals, is no small burden on most businesses. The regulations would require regulated businesses seeking safe harbor protection to determine whether “an exposure to [each] chemical is reasonably calculated to occur at a level that requires a warning.” See Proposed 27 C.C.R. § 25602(a). Products with multiple chemicals could require a very expensive review to determine if a triggering exposure is “reasonably calculated to occur” as to each separate listed chemical. Listing of multiple chemicals on the warning also could create a longer, cumbersome warning less likely to be understood by an observer.

OEHHA claims that it is requiring these 12 chemicals to be included by name on the Prop 65 warning “with the intent of making Proposition 65 warnings more informative and meaningful to the public.” January 2015 Warnings ISOR, p. 15. But, as with the March 2014 ISOR, OEHHA has again failed to articulate why listing the term “phthalates,” or “chlorinated tris,” or any other chemical name is any more “meaningful” to the average layperson than is a notice directing interested people to the OEHHA website for further information about Prop 65 exposures. As in March 2014, OEHHA still has provided no studies or evidence showing that the specific disclosure of these chemical names gives the public any useful information about the nature of any given individual’s potential risk of exposure or the ways that individual might reduce or avoid exposure.

Equally as concerning, OEHHA continues to say that the list of 12 chemicals required to be named in the warning “is not exhaustive and may be changed over time as the public becomes more familiar with the improved warning format.” January 2015 Warnings ISOR, p. 22. Once again, we are given no explanation as to why public familiarity “with the improved warning format” would somehow mean that including more chemical names on the warning would convey useful information to the public about their individual exposure or ways to minimize it. In response to the concern about eventually requiring many more chemicals to be listed in the warning, OEHHA does not dispute that there is no limit to the number of chemicals that could be added to the warning requirements in the future, but simply claims that regulated businesses will have “adequate time to modify warnings” to include ever more chemical names, given the need for OEHHA noticed rulemaking to add new chemicals. *Id.* What OEHHA doesn’t address is the added burden and cost businesses will have to incur every time their Prop 65 warnings must be changed to add new chemicals. And as the list of required “name” chemicals expands, the public will become less and less able to discern why one chemical is listed but another is not, and whether “named” chemicals have greater or different risks than other, unnamed chemicals.

Thus, by requiring businesses to determine if exposure to the 12 listed chemicals (and any other chemicals that may be added at a later date) is “reasonably calculated to occur,” OEHHA is essentially is either (a) creating a mandate on businesses across the state to conduct expensive scientific exposure assessments, or (b) effectively telling businesses that cannot afford such assessments to simply list most or all of the 12 chemicals on warnings in order to qualify for the safe harbor and avoid potential litigation. Neither result is likely to promote cost-efficient compliance or the inclusion of more useful or accurate information for the public. Indeed, requiring listing of 12 chemicals when they may *not* be appropriate in a warning, or where exposure cannot even be confirmed with certainty, will lead to confusion and be fundamentally *inconsistent* with the requirement for Clear and Reasonable warning provisions. As a result, OEHHA should delete the requirement for businesses to include chemical names on the Prop 65 warning in order to qualify for safe harbor protection. If OEHHA will not do that, at a minimum, OEHHA should allow warnings to qualify for the safe harbor protection so long as they include at least one “for example” compound or chemical from the 12 listed by OEHHA where that compound or chemical is “reasonably calculated to occur at a level that requires a warning.” This approach was noted by stakeholders and OEHHA Staff in the OEHHA March 25, 2015 workshop.

We believe the existing Prop 65 warning requirements have worked for decades without the need to list specific chemical names. Rarely, if ever, have our members gotten inquiries from the public asking what chemicals our members are providing the Prop 65 notice for. This suggests that the public is not demanding or requiring this

chemical name information in the Prop 65 warning. We continue to believe that requiring listing of chemical names (or, as here, an arbitrary subset) – especially given the formation of a lead agency website with potentially far more and more detailed chemical information available on demand – is a waste of resources with little or no measurable benefit to the public.

D. Retailers Should Post Warnings for Products Sold in Bulk

Section 25600.2(d) provides various scenarios in which a retailer should bear responsibility for providing the Prop 65 warning for a product exposure. One additional scenario that should be amended to this list is the situation where a manufacturer supplies the product in question to the retailer in bulk, and has advised the retailer that a warning is required for the product under Section 25249.6 of the Act. Warnings for bulk products that are not packaged individually are best posted by the retailer, who is in the best position to post a warning at the place of retail. If the product is further sold in bulk by the retailer, WSPA would support allowing the warning to “be provided on an invoice or receipt,” as OEHHA already proposes for bulk wood products.

E. The Revised Proposal Still Would Require Certain Methods of Transmission For Environmental Exposure Warnings That are Prohibited By Statute

OEHHA’s amended regulatory proposal continues to mandate transmission methods for environmental warnings that would be at odds with the Prop 65 statutes. Proposed 27 C.C.R. § 25605(a)(2) continues to require that Prop 65 warnings must be “mailed, or sent electronically or otherwise delivered to each occupant in the affected area.” Aside from substituting the term “personally delivered” with the term “delivered,” OEHHA has simply repeated the flawed provision it proposed in March 2014. This provision still directly violates Section 25249.11 of the Health and Safety Code, which states that warnings “*need not be provided separately to each exposed individual* and may be provided by general methods . . . provided that the warning accomplished is clear and reasonable.” Health & Safety Code § 25249.11(f) (emphasis added). Regardless of whether the proposed regulations mandate that the warning be “delivered to each occupant” or “personally delivered to each occupant,” OEHHA cannot mandate separate individual warnings and cannot promulgate this proposed requirement. If OEHHA’s intent was to remove any requirement for businesses to provide separate warnings for each individual, it should include that language expressly in the regulation to clarify to the regulated community that it does not intend to impose a requirement in conflict with the Prop 65 statutes.

In addition, the proposed requirement for businesses to provide a product- or environmentally-based warning in other languages “if any label, labeling or sign about a product is provided in a language or languages other than or in addition to English” or if any “other signage in the affected area” uses those languages is also unduly burdensome on many businesses. *See* Proposed 27 C.C.R. §§ 25603(d), 25605(a)(1). Some businesses carry many hundreds or even thousands of products, many of which contain labeling or point-of-purchase advertising provided in a different language. Other businesses provide signage throughout their premises in different languages – signage used for many other purposes besides warning for potential Prop 65 exposures. Requiring such businesses to provide Prop 65 warnings in every possible language that might appear on those products’ labels or advertising, or other signage on the premises, could force the revision of many thousands of warnings. The length of such Prop 65 warnings could increase significantly depending on how many languages the business has chosen to provide its customers on the products or its premises. That could render these warnings cumbersome and far too long to be read or understood by an average consumer, no matter what language she speaks.

Even more unclear is the requirement for businesses to provide warnings of potential environmental exposures “in any other language ordinarily used by the business to communicate with members of the public.” *See* Proposed 27 C.C.R. §§ 25605(a)(2). OEHHA provides no definition of what “ordinarily used” means. As such, businesses would have no way of reliably knowing whether some environmental warnings must be provided in other non-English languages, and if so, how many languages. Indeed, any prospective plaintiff could claim that the business has failed to qualify for “safe harbor” protection because it did not issue a Prop 65 warning in her language, and the business would be forced to go to court to attempt to explain whether it conducted enough business in that language to deem it “ordinarily used.”

Moreover, again, it is unclear what value there would be to the public revising warnings to include two, three, four or more multiple languages when the link to the OEHHA lead agency website is provided right there in the warning. On the website, OEHHA could choose to provide as many translations of the Prop 65 warning language as it wants. This information would exist on the website as a “one-stop” reference for any non-English speaking member of the public, translating standard safe harbor language that may remain substantially unchanged for some time. This is a far more economical and effective way to broadly reach non-English speakers of many different languages, rather than only reaching the very limited number of languages that can be practically fit on a Prop 65 label or sign.

II. The Requirements for the Proposed “Lead Agency Website” are Vaguely Worded, Extremely Burdensome on Businesses, and Will Create a New Round of Litigation By Bounty Hunter Attorneys

WSPA commends OEHHA for proposing the creation of a single, OEHHA-sponsored “lead agency website” to provide additional information about chemicals and ways to minimize potential exposures, for those members of the public interested in researching that information. WSPA also believes the restoration of “safe harbor” regulations helps to ensure that plaintiffs cannot use the presence of information on the website, but not in a warning otherwise qualifying for “safe harbor” protection, as somehow justifying a lawsuit alleging that the warning is not “clear and reasonable.”

However, WSPA believes certain aspects of the proposed “lead agency website” regulations could create unnecessary ambiguity and uncertainty for regulated businesses:

- Proposed Section 25205(a)(2) – Because “any person” may provide OEHHA information to “correct” the lead agency website, it is possible that third parties could submit information claiming that certain products or areas have more or different exposure pathways than a regulated business has represented, or that individuals will be exposed to a higher amount and/or concentration of a listed chemical than is discussed in the website materials. To avoid having enterprising professional Prop 65 plaintiffs “game” the system by seeking to leverage the website information in a lawsuit, regulated parties should be given the right to respond to any attempted third party “correction” regarding a regulated entity’s products and/or areas alleged to contain a Prop 65-listed chemical.
- Proposed Section 25205(b) – WSPA appreciates OEHHA’s acknowledgment that “[b]usinesses may coordinate reporting through their trade groups” as a more efficient way of providing the information requested for the lead agency website. *See* Initial Statement of Reasons, Jan. 16, 2015 (“January 2015 Website ISOR”), p. 8. However, WSPA is concerned that the actual regulations themselves do not clearly reflect this ability to provide required lead agency website information through a trade group or other representative association. WSPA would recommend that Section 25205(b) be amended to expressly allow the requested information also to be submitted by a representative group or association providing such information on behalf of any of the entities listed in the regulation. That appears to be

OEHHA's clear intent expressed in the January 2015 Website ISOR, but the regulatory language does not yet expressly give representative associations the ability to submit responsive information on behalf of the regulated entities.

- Proposed Section 25205(b)(9) – One required piece of information for the website is “reasonably available information concerning the anticipated level of human exposure to the listed chemical.” As WSPA has previously commented to OEHHA, “anticipated human exposure” is extremely difficult for most businesses to estimate. It requires knowledge of numerous factors that affect “exposure” (e.g., residence time, chemical concentration, dispersion in an area, proximity to source, etc.), making it virtually impossible for a regulated business to know the “anticipated level of human exposure to the listed chemical” from individual to individual. Although OEHHA has advised that it “will not be asking for information the business does not already have” (*see* January 2015 Website ISOR, p. 7), this is not currently reflected in the actual regulatory language. WSPA would recommend that proposed Section 25205(b)(9) be clarified to require “reasonably available information within the actual possession of the person required to give a warning concerning the anticipated level of human exposure to the listed chemical, based on information known to that person about the reasonable likelihood and probable level of exposure ”
- Proposed Section 25205(b)(8) – Similarly, regulated businesses do not always have complete information or knowledge about all possible “anticipated routes and pathways of exposure to the listed chemical(s) for which the warning is being provided.” Again, pathways or routes of exposure to a listed chemical typically depend on a host of factors, and could differ from individual to individual. For some products, inhalation exposure may be a “common” pathway, but for a small percentage of individuals, dermal exposures might be possible under some circumstances. Whether an infrequent or extremely uncommon exposure pathway should be “anticipated” by a regulated business is a question not answered by the regulations, leaving regulated businesses to guess what it means (e.g., whose “anticipation” is referenced here – the business’, OEHHA’s, the public’s or someone else’s?). We understand that, like with Section 25205(b)(9), OEHHA does not intend for businesses to have to conduct studies or gather research it does not already have with respect to exposure pathways. Thus, as with Section 25205(b)(9), WSPA would recommend that the section be clarified to require “common routes and pathways of exposure to the listed chemical(s) for which the warning is being provided that are known by the regulated business.”
- Proposed Section 25205(b)(10) – The proposed regulations allow OEHHA to request “[a]ny other related information that the lead agency deems necessary.” WSPA believes that this language is, on its face, unacceptably vague and overbroad. OEHHA seems to recognize this concern in the January 2015 Website ISOR, but claims that “[t]he scope of information that may be requested, however, is limited to information related to potential exposures to listed chemicals for which warnings are already being provided under the Act.” January 2015 Website ISOR, p. 7. This limitation would improve the scope of Section 25205(b)(10) if such language appeared in the regulation itself, but currently, it does not. Thus, WSPA recommends that OEHHA revise proposed Section 25205(b)(10) to read “Any other information that is both deemed necessary by the lead agency and which is related to potential exposures to listed chemicals for which warnings are already being provided under the Act.”
- Proposed Section 25205(c) – WSPA is concerned that the 15 days provided in this section for businesses to contest OEHHA’s planned release of Confidential Business Information is far too little time for businesses to reasonably gather together “additional justification for the claim or to contest the determination in an appropriate proceeding.” The January 2015 Website ISOR clarifies that OEHHA’s

intent was for this timeframe “to allow sufficient time for a party to commence any proceedings required to protect the information” (January 2015 Website ISOR, p. 9), but 15 days is still an insufficient amount of time for a business to determine if it can maintain a legal proceeding to protect the information. Given the difficulty most business will face in fully documenting and “proving” the confidential nature of the requested information within 15 days, WSPA requests that OEHHA modify this section to allow businesses to issue, within 15 days of the Public Records Act request at issue, a simple notice advising OEHHA that the business reasserts its request for nondisclosure of the confidential information, and within 60 days of the Public Records Act request, to provide “additional justification for the claim or to contest the determination in an appropriate proceeding.”

- Proposed Section 25205 generally - Finally, the Proposed “lead agency website” regulations contain no requirements on how OEHHA must manage the website going forward, how often OEHHA must update the website, how much time OEHHA has to add new pieces of information to the website, whether the website must contain all information provided by regulated businesses or just some subset, and whether OEHHA itself is bound to ensure that information provided on the website is complete, up to date, and not misleading. The inherent vagueness of many of these provisions leaves significant doubt as to how helpful an OEHHA-run website could be for the general public. Posting inaccurate or outdated information on the website could lead to unwarranted alarm, confusion or misunderstandings among individuals looking to the site for information about chemical exposures.

* * *

WSPA thanks you again for considering our comments on the revised proposed Prop 65 warning regulations. We continue to believe that the revised regulations will greatly benefit from further clarification and revision as discussed above, which we believe will reduce the costs of implementing the regulations while still properly fulfilling the purpose of the regulations to ensure Prop 65 warnings are “clear and reasonable,” and that the public has sufficient information available on the chemicals and exposures covered by Prop 65. We look forward to continuing to work with OEHHA in addressing these issues.

Should you have any questions, feel free to contact me or Mike Wang of my staff (cell: 626-590-4905; email: mike@wspa.org).

Sincerely,

