CalChamber
CALIFORNIA CHAMBER OF COMMERCE

June 6, 2016

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

Sent electronically to: P65Public.Comments@oehha.ca.gov

RE: 15-DAY NOTICE OF MODIFICATION TO TEXT OF PROPOSED REGULATION – TITLE 27, CALIFORNIA CODE OF REGULATIONS, PROPOSED REPEAL OF ARTICLE 6 AND ADOPTION OF NEW ARTICLE 6, PROPOSITION 65 CLEAR AND REASONABLE WARNINGS

Dear Ms. Vela:

The California Chamber of Commerce and the organizations listed below (hereinafter, "Coalition") thank you for the opportunity to submit comments regarding the Office of Environmental Health Hazard Assessment's ("OEHHA") 15-Day Notice of Modification to Text 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") dated May 20, 2016 ("Proposal"). Our Coalition consists of over two hundred California-based and national organizations and businesses of varying sizes that, collectively, represent nearly every major business sector that would be directly impacted by OEHHA's Proposal.

The Coalition appreciates OEHHA's willingness to work with our organizations throughout this nearly three year regulatory process. We appreciate that OEHHA has elected to modify the Proposal in response to certain concerns raised in the Coalition's comment letter dated April 26, 2016. However, OEHHA has also elected to retain some problematic provisions that would (1) substantially increase litigation by creating a new breed of "bad warning" litigation that does not exist today, wherein despite using the precise "safe harbor" warning content provided by OEHHA, businesses could nonetheless be challenged for failing to provide an adequate warning; (2) impose an unworkable, extraordinarily costly and elevated requirement on those providing warnings for environmental exposures; (3) require, for the first time since Proposition 65's passage, two warnings for one product; and (4) eliminate the long-accepted method of transmitting warnings via owners' manuals, which typically contain the most significant safety information for many products. This letter does not again comment on these issues; rather, the Coalition hereby incorporates by reference our comment letter dated April 26, 2016, which raised these issues and their practical and legal implications.[1]

Due to the late stage of this regulatory process, this comment letter focuses solely and exclusively on issues that must be addressed in OEHHA's Final Statement of Reasons (FSOR). Indeed, many provisions in the Proposal remain unclear and ambiguous and would benefit from clarification to ensure that the regulated community can clearly understand precisely what

[1] http://oehha.ca.gov/media/downloads/proposition-65/crnr/comments/calchamber042916.pdf

OEHHA intends and how to comply with the new requirements. For convenience, this letter addresses regulatory provisions as they occur chronologically in the Proposal.

1. **§ 25600(b): Compliance with New Regulations Prior to Effective Date**

Proposed Section 25600 subsection (b) states that "[a] person may provide a warning that complies with this article prior to its two-year effective date; such warning will be deemed to be clear and reasonable." The phrase "such warning will be deemed to be clear and reasonable" requires clarification in the FSOR.

Specifically, the FSOR must clarify that the provision allowing for compliance with the new regulations prior to the effective date pertains to the proposed warning content, methods of transmission, as well as to the provisions pertaining to retailers in proposed Section 25600.2. The Coalition proposes the following language for the FSOR:

> **Subsection (b) provides a two-year deferral of the effective date for the new regulations. For two years following publication of the updated final regulation following approval by the Office of Administrative Law, businesses will have the option of using either (1) the old safe harbor warning content and methods pursuant to the September 2008 revisions of Article 6, (2) the newly adopted safe harbor warning content and methods pursuant to the newly proposed regulations, including the processes set forth in Section 25600.2, or (3) alternative warnings that comply with either the requirements specified in 27 CCR § 25601 of the current regulations or Section 25600 subsection (f) of the new regulations.**

2. **§ 25601(b): The Phrase "one or more"**

Proposed Section 25601 subsection (b) contains two significant ambiguities that require clarification in the FSOR. First, the language might be interpreted by some to suggest that a warning must specify all of the chemicals for which a warning is being provided if the business determines to warn for exposures to more than one listed chemical. To wit, the requirement to name "one or more of the listed chemicals in the consumer product or affected area for which the warning is being provided" could suggest that if there is exposure to more than one listed chemical, the warning would have to specify every such chemical. As the Coalition understands it, OEHHA's intent is to allow businesses to specify one chemical (or, if applicable, one listed carcinogen and one listed reproductive toxin) in the warning, even if the warning is being provided for multiple listings.

Second, we understand that for purposes of providing a safe harbor warning, OEHHA intends to allow businesses to identify any listed chemical they select even if they are providing the warning for multiple listings. However, under the current language, if a business provided a warning for Prop 65 listed chemicals A and B, it is unclear whether the business can elect to identify only chemical A in the warning. This issue undoubtedly will serve as a basis for litigation absent a clear and unequivocal statement that the business has full discretion to determine which relevant listed chemical it will identify in its warning.

The Coalition proposes the following language for the FSOR to address these ambiguities:

> **Section 25601 subsection (b) states that a warning meets the requirements of the article if the name of "one or more" of the listed chemicals in the**

> **consumer product or affected area for which the warning is being provided is included in the text of the warning. The phrase "one or more" is intended to mean that if a warning is being provided for more than one carcinogen or more than one reproductive toxicant, then the person providing the warning may satisfy the safe harbor warning requirements by specifying one carcinogen or one reproductive toxicant in the warning. The business may, but is not required to, specify more than one carcinogen or reproductive toxicant in the warning. Further, the business may elect to specify any listed carcinogen or any listed reproductive toxin for which it is providing a warning. For example, if a warning is being provided for Proposition 65-listed carcinogens A and B, the warning may specify chemical A only, chemical B only, or both chemicals A and B.**

3. § 25602(a)(2): The Phrase "seek out the warning"

Proposed Section 25602 subdivision (a)(2) provides the following as one of several safe harbor warning methods for consumer products:

> "A product-specific warning provided via any electronic device or process that automatically provides the warning to the purchaser prior to or during the purchase of the consumer product, ***without requiring the purchaser to seek out the warning***."

(emphasis added.)

The phrase "without requiring the purchaser to seek out the warning," absent clarification, is too ambiguous and thus subject to give rise to litigation because electronic devices and processes by their very nature may only be employed in a manner that requires the consumer to interact with the device or process to some extent.

Accordingly, to avoid needless litigation over these issues, we strongly urge OEHHA to incorporate the following language in the FSOR to incorporate a rule of reason around what this vague phrase is intended to mean and ensure that steps that consumers ordinarily associate with using an electronic device while shopping, including those previously recognized by OEHHA in its ISOR, are permissible under the Proposal:

> **A purchaser shall be deemed to have sought out the warning only to the extent that he or she takes steps beyond those ordinarily associated with obtaining information via electronic devices or processes in the course of the purchase of a consumer product. Examples of steps ordinarily associated with obtaining information via electronic devices or processes include, but are not limited to, scanning a QR code with a smart phone and clicking on a hyperlink**.

4. § 25602(a)(4): The Term "on-product"

Proposed Section 25602 subsection (a)(4) permits the use of an "on-product label that complies with the content requirements in Section 25603(b)." Proposed Section 25603 subsection (b) allows for a short-form warning so long as the warning is an "on-product" warning.

Although in context the term "on-product" appears to refer to warnings that are on the exterior packaging of the product or on the product itself, the Coalition believes that the regulations would nonetheless benefit from a clarifying statement in the FSOR that the "on product" warning need not appear on the product itself but can instead appear on its exterior packaging. Of course, the Coalition understands that the short-form warning option is intended to incentivize businesses to provide warnings that consumers will be able to see before they purchase a product. If the FSOR does not clarify that "on product" also pertains to exterior packaging, then the short-form warning could only be used on the products themselves. In such circumstances, the warning would in many cases not even be visible to the consumer until the exterior packaging is opened after purchase. Accordingly, to ensure that OEHHA's intent of incentivizing the use of on-product warnings is effectuated, the FSOR must make this simple but nonetheless important clarification.

5. § 25602(d): Foreign Language Requirement

While the Proposal gives detailed and precise requirements for the language to be employed in the English-language warnings, it does not give an indication of how these warnings are to be properly translated. As the safe-harbor warnings have been replaced by these provisions, businesses do not have guidance on the content that must be included in the non-English warnings. Allegedly improperly translated warnings may further prompt lawsuits. Defending such a suit will require engaging linguistic experts to prevail, making a forced settlement inevitable. Accordingly, the FSOR should state that the precise verbiage of translated warnings are subject to liberal construction and a "rule of reason" so as to reduce the likelihood that private enforcers will pursue frivolous translation lawsuits.

6. § 25605(a)(3): The Phrase "one or more sources" in the Context of Environmental Exposure Warnings

Proposed Section 25605 subsection (a)(3) contains an ambiguity that requires clarification in the FSOR. Specifically, similar to the "one or more" language in the chemical specification requirement in proposed Section 25601 subsection (b), the language can be interpreted to suggest that an environmental exposure warning must specify all sources of exposure if the business determines that exposures are occurring from multiple sources. To wit, the requirement to name "one or more sources of exposure" suggests that if there is more than one source of exposure, the warning would have to specify every source. As the Coalition understands it, OEHHA's intent is to allow businesses to specify one source in the warning, even if exposures may be occurring from multiple sources. But given the current drafting ambiguity, some in the private enforcement community may interpret the language to mean that all sources must be specified in the warning. Thus, businesses that specify only one source when warning for multiple sources may be targeted for private enforcement actions and be required to defend such litigation in court at significant expense.

The Coalition proposes the following language for the FSOR to address this ambiguity:

> **Section 25605 subsection (a)(3) provides the safe harbor warning content for environmental exposure warnings. The safe harbor warnings require businesses to specify the name of "one or more sources of exposure" in their warnings. The phrase "one or more sources of exposure" is intended to mean that if a warning is being provided for chemicals that are exposing individuals from more than one source within the affected area, then the person providing the warning may specify one source in the warning. The**

> **business may, but is not required to, specify more than one exposure source in the warning. Further, the business may elect to specify any source for which it is providing a warning in its warning. For example, if a warning is being provided for Proposition 65-listed carcinogen A, which is exposing individuals from sources X and Y, the warning may specify source X only, source Y only, or both sources X and Y.**

7. § 25606(a): Occupational Exposure Warnings

Proposed Section 25606 subsection (a) related to occupational exposure warnings contains a similar ambiguity as previously contained in the grandfathering provision in proposed Section 25600 subsection (e). By way of background, in the Coalition's letter dated April 26, 2016, we noted that the final clause of proposed Section 25600 subsection (e) relating to release clauses—"if the warning fully complies with the order or judgment"—was unnecessary because the Court that ordered the settlement or final judgment retains jurisdiction to enforce the settlement or judgment. Specifically, we argued that subsection (e) could be interpreted improperly to allow third-parties to the Court-ordered settlement or final judgment to initiate litigation against companies subject to that Court order or judgment in another Court, asking that other Court to adjudicate the company's compliance, or lack thereof, with the rendering Court's order or judgment. In response, OEHHA eliminated the word "fully" from the modified Proposal and clarified the following in its accompanying notice:

> *This provision is intended to be a statement of current law. Specifically, if a party to a court-ordered settlement or judgement complies with the order requiring a particular method or content for a warning, the warnings provided are clear and reasonable as a matter of law. Commenters asked that OEHHA clarify its intent that this provision is not intended to provide a new avenue for enforcement of the law through this provision.*

Similarly, the phrase "fully complies with all warning information, training and labeling requirements . . ." in proposed Section 25606 subsection (a) may inadvertently lead private enforcers to believe that a new avenue for enforcement of Proposition 65 has been created. Particularly with respect to the federal and California HCS, the federal Occupational Safety and Health Administration has established clear boundaries for private enforcement of Proposition 65's occupational provisions. (See 62 Fed. Reg. 31159 (June 5, 1997).) The Coalition requests that OEHHA clarify in the FSOR that OEHHA does not intend this proposed section to contravene existing law on federal preemption of occupational warning aspects of Proposition 65.

Thank you for considering our comments. We appreciate the opportunity to participate in this very important regulatory process.

Sincerely,

Anthony Samson
Policy Advocate
California Chamber of Commerce

On behalf of the following organizations:

ACH Food Companies, Inc.
Adhesive and Sealant Council
Advanced Medical Technology Association (AdvaMed)
Agricultural Council of California
All-Coast Forest Products, Inc.
Alliance of Automobile Manufacturers
Allwire, Inc.
American Apparel & Footwear Association
American Architectural Manufacturers Association
American Beverage Association
American Brush Manufacturers Association
American Chemistry Council
American Cleaning Institute
American Coatings Association
American Composites Manufacturers Association
American Fiber Manufacturers Association
American Forest & Paper Association
American Frozen Food Institute
American Herbal Products Association
American Home Furnishings Alliance
American Lumber Company
American Petroleum and Convenience Store Association
American Wood Council
Amway
APA – The Engineered Wood Association
Apartment Association of Greater Los Angeles
Apartment Association of Orange County
Apartment Association, California Southern Cities
Associated Roofing Contractors of the Bay Area Counties, Inc.
Association of Home Appliance Manufacturers
AXIALL LLC
Auto Care Association
Automotive Specialty Products Alliance
Basalite Concrete Products
BASF Corporation
Belden
Berk-Tek
Bestway
Betco Corporation
Bicycle Product Suppliers Association
Biocom
Biotechnology Innovation Organization
Brawley Chamber of Commerce
Breen Color Concentrates
Building Owners and Managers Association of California
Burton Wire & Cable
California Apartment Association
California Asphalt Pavement Association
California Association of Boutique & Breakfast Inns
California Association of Firearms Retailers
California Association of Health Facilities

California Attractions and Parks Association
California Automatic Vendors Council
California Automotive Business Coalition
California Building Industry Association
California Business Properties Association
California Cement Manufacturers Environmental Coalition
California Citizens Against Lawsuit Abuse
California Construction and Industrial Materials Association
California Cotton Ginners Association
California Cotton Growers Association
California Farm Bureau Federation
California Furniture Manufacturers Association
California Grocers Association
California Hospital Association
California Hotel & Lodging Association
California Independent Oil Marketers Association
California Independent Petroleum Association
California League of Food Processors
California Life Sciences Association
California Manufacturers and Technology Association
California Metals Coalition
California/Nevada Soft Drink Association
California New Car Dealers Association
California Paint Council
California Rental Housing Association
California Restaurant Association
California Retailers Association
California Self Storage Association
California Small Business Alliance
California Travel Association
Camarillo Chamber of Commerce
Can Manufacturers Institute
Carlsbad Chamber of Commerce
CAWA – Representing the Automotive Parts Industry
Central Valley Building Supply
Chambers of Commerce Alliance Ventura and Santa Barbara Counties
Chemical Fabrics & Film Association, Inc.
Chemical Industry Council of California
Civil Justice Association of California
Coast Wire & Plastic Tec., LLC
Communications Cable and Connectivity Association
Composite Panel Association
Computing Technology Industry Association (CompTIA)
Consumer Technology Association
Consumer Healthcare Products Association
Consumer Specialty Products Association
Copper & Brass Fabricators Council, Inc.
Council for Responsible Nutrition
Crenshaw Lumber Company
Dow Chemical Company
DuPont

East Bay Rental Housing Association
Economy Lumber
El Centro Chamber of Commerce
Fairfax Lumber & Hardware
Family Winemakers of California
Fashion Accessories Shippers Association
Federal Plastics Corporation
Flexible Vinyl Alliance
Footwear Distributors & Retailers of America
Frozen Potato Products Institute
Ganahl Lumber
Graco Inc.
Greater Bakersfield Chamber of Commerce
Greater Conejo Valley Chamber of Commerce
Grocery Manufacturers Association
Halogenated Solvents Industry Alliance, Inc.
Hardwood Plywood Veneer Association
Independent Lubricant Manufacturers Association
Industrial Environmental Association
Information Technology Industry Council
International Crystal Federation
International Franchise Association
International Council of Shopping Centers
International Fragrance Association, North America
IPC – Association Connecting Electronics Industries
ISSA, The Worldwide Cleaning Industry Association
J.R. Simplot Company
Juvenile Products Manufacturers Association
Loes Enterprises, Inc.
Lonseal, Inc.
LP Building Products
Medical Imaging & Technology Alliance
Metal Finishing Association of Northern California
Metal Finishing Association of Southern California
Mexichem
Motor & Equipment Manufacturers Association
NAIOP of California, the Commercial Real Estate Development Association
National Association of Chemical Distributors
National Council of Textile Organizations
National Electrical Manufacturers Association
National Federation of Independent Business
National Lumber and Building Material Dealers Association
National Marine Manufacturers Association
National Shooting Sports Foundation
Natural Products Association
NorCal Rental Property Association
North American Home Furnishing Association
North Orange County Chamber
North Valley Property Owners
Nutraceutical Corporation
OCZ Storage Solutions

Orange County Business Council
Osborne Lumber Company
Outdoor Industry Association
Outdoor Power Equipment Institute
Oxnard Chamber of Commerce
Pacific Coast Producers
Pacific Water Quality Association
Pactiv Corporation
Parterre Flooring Systems
Personal Care Products Council
PGP International, Inc.
PhRMA
Plumbing-Heating-Cooling Contractors Association of California (CAPHCC)
Plumbing Manufacturers International
Polyurethane Manufacturers Association
Power Tool Institute
Printing Industries of California
Procter & Gamble
Rancho Cordova Chamber of Commerce
Redondo Beach Chamber of Commerce
Reel Lumber Service
Resilient Floor Covering Institute
Roadside Lumber & Hardware Inc.
San Diego County Apartment Association
San Diego Regional Chamber of Commerce
San Joaquin Lumber Company
Santa Barbara Rental Property Association
Santa Maria Chamber of Commerce
Searles Valley Minerals
Sentinel Connector System
Sika Corporation
Simi Valley Chamber of Commerce
Specialty Equipment Market Association
SPI: The Plastic Industry Trade Association
SPRI, Inc.
South Bay Association of Chambers of Commerce
Southwest California Legislative Council
Sporting Arms and Ammunition Manufacturers' Institute, Inc. (SAAMI)
Straight-Line Transport
Styrene Information and Research Center
Superior Essex
Taiga Building Products
TechNet
The Adhesive and Sealant Council
The Art and Creative Materials Institute
The Association of Global Automakers, Inc.
The Kitchen Cabinet Manufacturers Association
The Chamber of the Santa Barbara Region
The Vinyl Institute
The Vision Council
Toy Industry Association

Travel Goods Association
Treated Wood Council
USANA Health Sciences, Inc.
USHIO America, Inc.
Valley Industry & Commerce Association
Van Matre Lumber
Visalia Chamber of Commerce
Water Quality Association
WD-40 Company
West Coast Lumber & Building Materials Association
Western Agricultural Processors Association
Western Electrical Contractors Association
Western Growers Association
Western Mining Alliance
Western Plant Health Association
Western Propane Gas Association
Western States Petroleum Association
Western Wood Preservers Institute
Window & Door Manufacturers Association

cc: Matthew Rodriguez, Secretary, CalEPA
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