



# AmericanCoatings ASSOCIATION<sup>SM</sup>

September 21, 2015

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Submitted via E-mail: [P65Public.Comments@oehha.ca.gov](mailto:P65Public.Comments@oehha.ca.gov)

## **Re: Modification to Text of Proposed Regulation – Warning Website**

Dear Ms. Vela:

The American Coatings Association (“ACA” or “Association”) submits these comments to the California Environmental Protection Agency, Office of Environmental Health Hazard Assessment (“OEHHA” or “Agency”) on the proposed California Safe Drinking Water and Toxic Enforcement Act of 1986 (“Prop 65”) reforms. ACA testified on March 25, 2015, submitted written comments to OEHHA on April 8, 2015, and submitted comments on June 15, 2015, in response to the Agency’s proposal to create a website under Article 2, Section 25205 (“Lead Agency Website”). ACA has remained actively involved in providing OEHHA with meaningful input as the Agency has made a number of the revisions to its proposal. ACA appreciates the opportunity to comment on OEHHA’s “notification of modification of text” of its Lead Agency Website proposal.<sup>1</sup>

ACA is a voluntary, nonprofit trade association representing approximately 250 paints, coatings, adhesives, sealants, and caulks manufacturers, raw materials suppliers to the industry, and product distributors. The manufacture, sale, and distribution of paints and coatings are a \$20 billion dollar industry in the United States. ACA’s membership represents over 90% of the total domestic production of paints and coatings in the United States. The state of California currently represents approximately 18% of our domestic coatings market. ACA represents over 20 paint and coatings companies with locations in California. The paint and coatings industry, including manufacturers and retailers, employs over 31,000 workers in California.

ACA applauds the Agency’s consideration of its previously submitted comments and numerous requests from businesses, both large and small, to make those necessary changes. However, ACA strongly urges OEHHA to adopt the remaining recommendations and concerns our industry has over certain provisions that are unchanged in this new draft. If these issues remain unchanged, they will create significant challenges for manufacturers.

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<sup>1</sup> Proposed Regulation, “Title 27, California Code of Regulations Article 2 Section 25205 Lead Agency Website.” September 4, 2015. [http://www.oehha.ca.gov/prop65/CRNR\\_notices/WarningWeb/pdf/LeadAgencyWebsite2ndModText.pdf](http://www.oehha.ca.gov/prop65/CRNR_notices/WarningWeb/pdf/LeadAgencyWebsite2ndModText.pdf).

## OEHHA's Lack of Statutory Authority

ACA reiterates its position that the Lead Agency Website should be *voluntary* for manufacturers, producers, distributors and importers of products regulated under Prop 65. Earlier in the rulemaking process, OEHHA stated in stakeholder meetings that it had intended to give businesses providing warnings the *option* of submitting information for a new public website. Instead, the Agency has opted to impose a mandatory requirement on manufacturers to respond to OEHHA's information requests. OEHHA explains in its Initial Statement of Reasons ("Article 2 ISOR") that the purpose of these information requests is to "supplement" the basic information conveyed by Prop 65 warnings, and to "[aid] interested individuals who receive a warning to learn about the chemicals involved in a potential exposure."<sup>2</sup>

Compliance with the requirements for a Lead Agency Website will create a new element of complexity beyond providing clear and reasonable warnings under Prop 65. For the first time under Prop 65, businesses will have the legal obligation to submit an array of information for OEHHA at its request, and see this information posted on a website for the public to scrutinize. In addition, the practical consequence of this Lead Agency website would be that it would effectively become a "database" of information for potential Prop 65 lawsuit targets, where attorneys could compare the information published on the website with the products in commerce to see if they have corresponding warnings. This presents significant concerns for businesses, particularly small businesses, who may not be able to update the products on their shelves as quickly as updating information on a website. This also presents a problem in that the result could contradict Governor Brown's twin goals of Prop 65 reform—to prevent the flood of frivolous litigation and to improve the quality of warnings for consumers.

In addition to the burdens and litigation problems that this Lead Agency Website creates with the new obligations on manufacturers, ACA questions OEHHA's statutory authority to impose these obligations in the first place. OEHHA justifies this Lead Agency Website under the "right-to-know" purposes of the statute so that OEHHA can provide more detailed information about exposures to listed chemicals for which warnings are being provided. Further, the Article 2 ISOR states that the Agency has the authority under Section 25249.11 of the Act to "require a given business or industry to provide it with certain information related to the warnings business may be providing, should that become necessary."<sup>3</sup>

Section 25249.11 states that in section (f), defining warnings, "[w]arning' within the meaning of Section 25249.6 need not be provided separately to each exposed individual and may be provided by general methods such as labels on consumer products, inclusion of notices in mailings to water customers, posting of notices, placing notices in public news media, and the like, provided that the warning accomplished is clear and reasonable." This section does not translate to authority to require that businesses provide supplemental information for a public website. In fact, no provision in the Prop 65 regulations explicitly gives OEHHA the authority to require businesses to provide supplemental information beyond what is already provided in a Prop 65 mandated warning.

Furthermore, in the proposed new Article 6 regulations, Section 25600 (d) (General provisions) states that a person *can* provide supplemental information to the warnings required under Section 25608 ("Specific Product, Chemical and Area Exposure Warnings"). ACA reiterates that OEHHA should use this

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<sup>2</sup> Article 2 ISOR at pg. 4.

<sup>3</sup> Article 2 ISOR at p. 10.

provision it has already proposed in Article 6 to obtain the same kind of information it seeks under the Lead Agency Website regulations without going outside of its authority.

If OEHHA continues to pursue the Lead Agency Website, ACA has a number of practical concerns with the proposed regulation as well:

### **1. Lack of Opportunity to Review Web Content *PRIOR* to Publication**

Section 25205(a)(1) allows OEHHA to: 1) develop and maintain the Lead Agency Website to publish warning information provided under subsection (b); and 2) publish information provided that OEHHA determines is relevant. Section 25205(a)(5) allows manufacturers to request that information be corrected *after* OEHHA publishes it to the website. While ACA commends OEHHA for establishing a process in which information published on the Lead Agency Website can be corrected, ACA asserts that manufacturers should be provided the opportunity to review and respond to OEHHA *prior* to publication. This opportunity should be explicitly stated in the proposed regulation for businesses that supply information to the Agency and for businesses whose products are being discussed on the website to be able to review and comment on the information before publication. Post-disclosure corrections create the risk that OEHHA will get pulled into litigation involving parties that rely on information that ultimately turns out to be inaccurate.

During ACA's meeting with OEHHA staff on March 24, 2015, OEHHA stated that the Agency plans to develop fact sheets on chemicals in products based upon publically available information. ACA urges OEHHA to carefully consider the information it posts. Although OEHHA does not consider the publication of this information to be a "regulation," the Agency is an authoritative body in California. When OEHHA releases information on the Lead Agency Website, it will be considered accurate and will carry the weight of a "regulation" with the public. Since the purpose of the Lead Agency Website is to provide the public with "valuable supplementary information...regarding warnings that are being provided to the public," it is critical to the purpose of the regulation that OEHHA work with industry to ensure the information published is accurate and a fair depiction of a products containing certain chemicals.

Additionally, it is important that OEHHA respond to and review the information in a timely manner. At the very least, the contested information should be immediately removed from the public domain.

ACA suggests amending Section 25205(a)(5) to say the following:

Provide a process for persons to review information impacting their businesses that is proposed to be request a correction of material provided on the website. If the person claims there are inaccuracies on the website, the person shall have the opportunity to provide information showing that material is inaccurate. The Lead Agency will immediately remove contested information from the website that is shown to be inaccurate.

### **2. Difficulty of Obtaining Information OEHHA Can Request from Businesses**

While the Agency does not intend that this website be onerous on industry and will look to information already available before requesting additional information from companies, ACA has a number of suggestions to address the practical challenges businesses will face in managing these requests. ACA presented safety data sheets (SDSs) to OEHHA staff on March 24, 2015, from a member company that

demonstrated that downstream formulators often receive limited information provided via SDSs from their upstream suppliers. This information often contains either incomplete or inconclusive information regarding the residual levels of Prop 65 listed chemicals. If OEHHA wants to increase the relevancy of warnings, it should provide a de minimis threshold because manufacturers cannot adequately determine the exposure to residual Prop 65 chemicals based on the limited information provided by upstream suppliers. To develop exposure information to prove a residual chemical does not require a warning would require extensive testing.

If OEHHA does not provide de minimis reporting threshold for its website, manufacturers will be forced to list each and every Prop 65 chemical in their products, regardless of if there is exposure to the chemical. ACA reiterates the argument that since this website is intended to better inform the public of chemical exposures so individuals can make “informed decisions about those exposures,” this information will mislead the public to thinking there are high risks of exposure to chemicals that are only residuals or that have no exposure upon use of the product.

Therefore, to strengthen the quality of supplemental information on the Lead Agency Website, ACA suggests the following change to section 25205(b):

(3) The name of the listed chemical or chemicals for which a warning is being provided that are present above 0.1% concentration.

At the minimum, ACA strongly encourages OEHHA, when posting information about chemical exposures in products, to make clear to the public which chemicals pose the most significant risks and which chemicals are unintentionally added or byproducts.

Accordingly, if OEHHA will not provide a de minimis reporting threshold, ACA suggest the following change to section 25205(b):

(3) The name of the listed chemical or chemicals for which a warning is being provided and whether the chemical is intentionally added or present as a contaminant or unintentional byproduct of a product.

Regarding sections 25205(b)(6) and (9), the limited information regarding chemical ingredients on the SDS often either comes in ranges or is incomplete. This makes it unreasonably difficult for downstream formulators to develop meaningful, quantitative estimates of exposure. Although the Agency has clarified in subsection (c) that businesses do not need to generate new information solely to respond to a request by the Lead Agency, OEHHA should acknowledge, in the regulations, that downstream formulators may not have the exposure information that Agency may request from their suppliers. In section 25205(b)(7) OEHHA makes this concession stating that that the information only needs to be provided if it is known; ACA requests that this qualification be provided to subsection (b)(6). Further, subsection (9) should be combined with subsection (8) to allow manufactures to provide appropriate exposure information.

ACA suggests amending these subsections to state the following:

(6) For product warnings, the concentration (mean, minimum, maximum) of the chemical or chemicals in the final product, if known or can be determined based upon information from upstream suppliers. The product contains multiple component parts the business must provide the concentration (mean, minimum, maximum) of the chemical or chemicals in each of the

components, if known or can be reasonably determined based upon information from upstream suppliers.

(8) A description of the anticipated routes and pathways, and estimated level of exposure to the listed chemical(s) for which the warning is being provided, if known or can be reasonably determined based upon information from upstream suppliers.

### **3. Need for a Longer Time Frame to Respond to an OEHHA Request**

The proposed regulation now gives a 90-day timeframe for a manufacturer to respond to a request for additional information from OEHHA. While ACA is pleased to see OEHHA respond to industry's request for a clear timeframe, ACA would like to reiterate its request for **six months** to respond to the Agency's request. The intention is not to delay the publication of information to the website, but to allow businesses the appropriate time to develop accurate information that OEHHA requests. Six months allows a more reasonable time period for manufacturers to gather, review and confirm the accuracy of the requested information from multiple upstream suppliers. This is a particular challenge for paint and coatings manufacturers who may have to reach out to numerous raw material suppliers who provide concentration information in the form of estimates or ranges. The burden of working around confidentiality concerns and limitations on the precision of available data almost guarantees significant delays in the recovery of the information requested by OEHHA's proposal. It is important that formulators have sufficient time to confer with their suppliers to make accurate submissions to the website. Additionally, to prevent confusion, the regulation should make clear that the deadline commences on the day the business receives the request from OEHHA rather than the date OEHHA sends the request. This way businesses can receive the entire time period to comply with a request rather than risk being at a disadvantage with delays in the mail or failing to receive a notice.

ACA suggests that this section be amended to:

Within ~~180~~ 90 days of receipt of the lead agency's request, the manufacturer, producer, distributor, or importer of a product, including food, or a particular business that is providing a warning pursuant to Health and Safety Code section 25249.6, must provide the following information, when reasonably available, for use by the lead agency in developing content for the website.

### **4. Technical Recommendations**

To address a few technical considerations, ACA members recommend that OEHHA allow businesses, voluntarily, to register a point of contact when making requests for information to ensure that OEHHA is coordinating with the appropriate employee responsible for managing the information request. Also, ACA recommends OEHHA define how they plan to contact businesses, either by email or mail, or both. Further, ACA suggests that the content on the Lead Agency Website should be in a web based format, such as HTML rather than in a downloadable form, such as a pdf. While it is possible that information in HTML formatting can be downloaded and saved, this will help to control the information OEHHA is publishing and protect business from any inaccurate statements made on the Lead Agency Website.

## CONCLUSION

ACA remains hopeful that with continued collaboration between OEHHA and all interested stakeholders, Prop 65 reform will alleviate the large number of frivolous lawsuits crippling the system, while continuing to protect and inform the people of the state of California. For additional information or questions, please contact Javaneh Nekoomaram at (202) 719-3715 or at [jnekoomaram@paint.org](mailto:jnekoomaram@paint.org) or Stephen Wieroniey at (202) 719-3687 or at [swieroniey@paint.org](mailto:swieroniey@paint.org).

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