California Council for Environmental and Economic Balance
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January 25, 2016

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

Via Electronic Transmission

RE: Repeal of Article 6 and Proposed Adoption of the New Article 6 – 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 intent to repeal its January 19, 2015 rulemaking proposal for Article 6 in Title 27 of the California Code of Regulations pursuant to the Safe Drinking Water and Toxic Enforcement Act ("Proposition 65") and its introduction of a new proposed Article 6 rulemaking package. In addition to the comments and concerns outlined in this letter, CCEEB also endorses the comments submitted by the CalChamber-led coalition regarding the repeal and proposed new rulemaking to the Proposition 65 Clear & Reasonable Warning 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 greatly appreciate the significant progress that has been made on many of the issues raised by CCEEB in its letter of April 8, 2015 (attached and incorporated by reference via this letter) and other stakeholders under the first rulemaking package introduced last year. Specifically, we appreciate the inclusion of a sell through provision for consumer products manufactured prior to the effective date (Section 25600(b)); revision dropping problematic language regarding supplemental information to provide context for warnings; inclusion of an explicit grandfather provision for court-approved settlements or final judgements; eliminating the list of twelve chemicals required to be listed on a product warning provision; and more.

Despite these beneficial changes from last year's proposed rulemaking, CCEEB and its members continue to have concerns regarding a few components of the

November 27, 2015 proposed rulemaking. The concerns, as outlined below, will result in compliance challenges, increased unwarranted and potential consumer confusion.

Section 25600(d) – General, Supplemental Information

As noted, CCEEB appreciates the elimination of the terms “dilute” and “diminish” from the 2015 proposal regarding supplemental information, the term “contradict” lacks clarity. It is not defined in the new rulemaking proposal or the Initial Statement of Reasons (ISOR). OEHHA instead opts to cite an example of supplemental information and deems it contradictory to the warning without any explanation of the thinking or citation to provide further context to the regulated community. More specifically, in the ISOR OEHHA indicates it is aware of companies providing supplemental information that seeks to diminish the value of the Proposition 65 warning. The statement is supported by a mere reference of a furniture manufacturer’s warning it seems to disapprove of without any explanation as to why the example “contradicts” the warning given compliant with Proposition 65.

Under current California law associated with Section 17200 of the Business and Professions Code, OEHHA could pursue an enforcement action for deceptive business practices. As such, if OEHHA deems a responsible entity has inappropriately used supplemental information it could pursue such an avenue rather than opening all entities to potential litigation under the private right of action provisions associated with Proposition 65. In this regard, CCEEB recommends the deletion of both the reference in the proposed regulations and the ISOR as it lacks clarity and is duplicative of the authority to bring an action against deceptive business practices of an entity under established provisions of the Business and Professions Code.

Section 25600(f) – General, Grandfathering

As noted, CCEEB appreciates the explicit inclusion within the regulations of language providing that a person that is party to and complies with the requirements of a court-ordered settlement or final judgement is deemed to be providing a “clear and reasonable” warning.

That said, CCEEB remains concerned that the proposed subdivision (f) only grandfathers in warnings provided for consumer products or environmental exposures. Of note, older court-approved consent judgements also address occupational exposures, which are as valid and legally binding.

Additionally, we are concerned the phrase “if the warning fully complies with the order or judgement” in this section. The phrase may suggest third party enforcement and litigation of court-approved settlements or final judgements is contemplated as part of the Clear and Reasonable Warning regulations. To be clear, only the court that presided over the settlement or judgement has the authority to assess compliance pending relevant legal proceedings.

In this regard, CCEEB urges OEHHA to eliminate the phrase “consumer products or environmental warning” from the proposed regulation as a means of consistency. The phrase “if the warning fully complies with the order or judgment” should also be deleted as it lacks legal authority.

Section 25601(b) – Safe Harbor Clear and Reasonable Warnings – Methods and Content, Clear and Reasonable Definition

While the language indicates businesses can warn using content or methods different from those deemed “clear and reasonable” per the regulations, CCEEB remains concerned that the phrase “clear and reasonable” continues to be used in the regulatory proposal without any 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” standard may no longer be deemed compliant as subject to private enforcers’ determination.

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, this section continues to fall short in meeting this goal.

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.

Section 25601(c) – Safe Harbor Clear and Reasonable Warnings – Methods and Content, Chemical Specification Requirement

As noted, CCEEB appreciates the revision made in the latest proposed regulations related to chemical identification in warnings. CCEEB was adamantly opposed to the requirement to specifically identify all of the relevant twelve chemicals/chemical categories for which a warning was required in order to be deemed within the bounds of a safe harbor warning.

That said, the latest proposal continues to require the specification of one or more chemicals for which the warning is required to be included in the text of the Proposition 65 warning. This approach is also problematic.

First, the language as drafted could be interpreted to suggest that a warning must include all of the chemicals for which a Proposition 65 warning may be required. We believe we understand OEHHA’s intent to be that one chemical should be included in the warning, but the phrase “one or more” lacks clarity as to whether a responsible entity is required to list more or if one would suffice to meet the safe harbor warning requirements. Further, it lacks clarity as to whether

the chemical listed in the warning must be the one present with greater risk of exposure, greater quantity, or if it could be one that presents the least amount of risk. Also problematic, the language fails to provide clarity from a consumer perspective about the naming of carcinogens versus reproductive toxicants. A consumer may be confused about the hazard trait(s) of a particular chemical within the warning if one is listed but not another with a different endpoint and yet both hazard traits are listed in the warning. Failure to be clear about this meaning could result in additional litigation based on different interpretations that suggest all Proposition 65-listed chemicals must be specified in the warning or that the responsible entity failed to warn for the greater threat of exposure. Failure to clarify could also result in consumer confusion about various chemicals' hazard traits, seemingly in conflict with the intent of Proposition 65 and OEHHA in drafting this section.

Conclusion

As previously noted, in addition to the specific comments offered in this letter we endorse the comments submitted by the CalChamber-led Coalition.

Thank you for the opportunity to comment. Should you have questions, please contact CCEEB's Water, Chemistry and Waste Project Manager Dawn Koepke with McHugh, Koepke & Associates at dkoepke@mchughgr.com or (916) 930-1993.

Sincerely,

Gerald D. Secundy
CCEEB President

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