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Sent Electronically to: P65Public.comments@oehha.ca.gov

SUBJECT: CLEAR AND REASONABLE WARNING REGULATIONS

Dear Ms. Vela:

The California Hotel & Lodging Association and the California Association of Boutique & Breakfast Inns (collectively **CH&LA**) thank you for the opportunity to submit comments regarding the Office of Environmental Health Hazard Assessment's (**OEHHA**) Notice of 2016 Rulemaking to Article 6 in Title 27 of the California Code of Regulations pursuant to the Safe Drinking Water and Toxic Enforcement Act (**Prop. 65**) dated November 27, 2015.

On November 27, 2015, OEHHA gave notice of its decision not to proceed with its Notice of 2016 Rulemaking to Article 6 in Title 27 of the California Code of Regulations dated January 19, 2015 (**2015 Regulations**) to allow sufficient time for public comment regarding modifications to the 2016 regulatory language. The current 2016 regulations (**2016 Regulations**) repeal and replace the 2015 Regulations and thus initiate a new formal rulemaking process under the Administrative Procedure Act (**APA**).

For OEHHA's reference:

- CH&LA is the largest statewide lodging industry trade association in the nation. CH&LA's members represent hundreds of thousands of guest rooms in hotels, motels, bed and breakfast inns, resorts, spas, timeshares, and extended stay establishments, among other transient lodging establishments.

In addition to the foregoing types of establishments, California's transient lodging industry also includes camps, campsites, camping cabins, "lots" (which also cover tents, camp cars, and camping parties, or other rental units), mobilehomes, and recreational vehicle parks¹. Such facilities and establishments are, for most purposes, treated legally the same as traditional hotels and other types of transient lodging establishments.²

For purposes of this letter, all transient lodging establishments in California, including but not limited to the types of operations identified in the preceding paragraphs, will be referred to as **hotels**.

- According to Smith Travel Research (**STR**), the lodging industry's primary source of statistical information, there are currently 5,537 hotels (507,589 guest rooms) located in California. Note that STR's profile of the number of hotels in California does not include properties with less than 15 rooms, and this obviously excludes the hundreds of bed and breakfast inns and other hotels under 15 rooms. In addition, STR's statistics do not include the camping sites, campgrounds, recreational vehicle parks, et cetera listed above.
- All but a very small number of hotels in California are "persons in the course of doing business" and therefore subject to all of the requirements of Prop. 65 in that they will have ten or more full and part-time employees.³
- The vast majority of those hotels are smaller operations: for example 75% (4,153 properties) of the California hotels in STR's profile are under 100 rooms in size; 64% (3,543 properties) are under 75 rooms in size, and 52% (2,280 properties) are under 50 rooms in size.
- While the number of full and part-time employees any particular hotel will employ depends on the specifics of the hotel's operations, a safe rule of thumb is that a hotel with 20 rooms or more will have ten or more employees; however, although even smaller hotels in many situations will have ten or more employees as defined by Prop. 65.

As explained in Section 1 below, virtually no hotel in California can possibly comply with the *current* "clear and reasonable" warning regulations, and that problem will be compounded by the 2016 Regulations.

CH&LA is part of the California Chamber of Commerce coalition (**coalition**) that is addressing and responding to the 2016 Regulations. The coalition is submitting to OEHHA a letter, by the January 25, 2016, deadline, setting forth many concerns, issues, and proposals regarding the 2016 Regulations. CH&LA fully supports the coalition's letter to OEHHA, and hereby incorporates it fully herein by reference.

As pertains to the lodging industry, the most important aspect of complying with the Prop.65 warning requirements involves environmental exposures, and this letter will deal with that type of exposure, unless otherwise noted.

1. Application of The Administrative Procedures Act (APA)

Although the 2016 Regulations and the Initial Statement of Reasons (**ISOR**) make it clear that utilizing the safe harbor warning mechanism is voluntary, it is obviously OEHHA's intent and hope that businesses will seek to comply with the "safe harbor" criteria set forth therein. The analysis in this letter of the safe harbor requirements in the 2016 Regulations involves the extent, if any, to which specific aspects of those safe harbor provisions comply with the APA. Consequently, certain aspects of the APA should be noted at the outset.

The provisions of the 2016 Regulations must satisfy the criteria in Government Code Section 11349.1(a):

(a) The office shall review all regulations adopted, amended, or repealed pursuant to the procedure specified in Article 5 (commencing with Section 11346) and submitted to it for publication in the California Code of Regulations Supplement and for transmittal to the Secretary of State and make determinations using all of the following standards: (1) Necessity. (2) Authority. (3) Clarity. (4) Consistency. (5) Reference. (6) Nonduplication. (These terms are defined in Government Code Section 11349.)

The requirement for "clarity" is particularly important to the analysis in this letter, because a great many of the provisions in the 2016 Regulations. Therefore, the following aspects of the clarity requirement should be noted:

- Government Code Section 11349(c) states: "'Clarity' means written or displayed so that the meaning of regulations will be easily understood by those persons directly affected by them."
- Title 1, CCR, Section 16(a)(1) how the clarity test is applied in reviewing proposed regulations: a) A regulation shall be presumed not to comply with the "clarity" standard if any of the following conditions exists:

(1) the regulation can, on its face, be reasonably and logically interpreted to have more than one meaning... (Emphasis added.)

CH&LA will identify those provisions of the 2016 Regulations that fail the “clarity” test.

2. General Comments Regarding OEHHA’s Approach to Creating A “Safe Harbor” for Warnings

A. Generally

The requirement to provide “clear and reasonable” warnings under Prop. 65 is found in Health and Safety Code Section 25249.6: “No person in the course of doing business shall knowingly and intentionally expose any individual to a chemical known to the state to cause cancer or reproductive toxicity without first giving clear and reasonable warning to such individual, except as provided in Section 25249.10.” (Emphasis added.)

The phrase “knowing and intentionally” is critical to determining whether and when a warning is required – and therefore if a business has violated the mandate to give clear and reasonable warnings.

OEHHA has defined “knowingly” for purposes of Prop. 65 as follows:

“Knowingly” refers only to knowledge of the fact that a discharge of, release of, or exposure to a chemical listed pursuant to Section 25249.8(a) of the Act is occurring. No knowledge that the discharge, release or exposure is unlawful is required. However, a person in the course of doing business who, through misfortune or accident and without evil design, intention or negligence, commits an act or omits to do something which results in a discharge, release or exposure has not violated Sections 25249.5 or 25249.6 of the Act. (Title 27, CCR, Section 25102(n). Emphasis added.)

The word “knowledge” as used in OEHHA’s definition above connotes that a person cannot be held to have knowledge of an exposure under Prop. 65 is occurring unless the actually knows that an exposure is occurring. That is, the person must be aware of the existence of the exposure, understands and comprehends that there is in fact an exposure, and realizes that there is an exposure.

OEHHA has not defined what the word “intentional” means in this context. If the phrase “knowingly and intentionally” were applied in its normally understood and accepted sense, no business could possibly be deemed to have acted knowingly and intentionally, because the 2016 Regulations make it impossible for a business to have the requisite scienter (i.e., the

fact of an act having been done knowingly). For example, it is impossible for virtually any business to analyze and understand which of the 800+ chemicals on the Prop. 65 list are present in its operations, and therefore no business can be said to be knowingly and intentionally creating an "exposure" that requires a warning.

OEHHA recognizes that the question of whether a business currently has a duty to provide a warning is a complex and difficult task. OEHHA's "Frequently Asked Question About Prop. 65" demonstrate the difficulty involved as set forth below.

Q: As a business, how do I know if I need to provide a Prop. 65 warning?

A: Using your knowledge of your business operations and the chemicals you use, review the Prop. 65 list to determine whether your operations or products are likely to expose individuals to any listed chemicals. Depending on the level of exposure, you may be required to provide a warning for those exposures.

OEHHA adopts safe harbor levels (levels of exposure that trigger the warning requirement) for many listed chemicals. Businesses that cause exposures greater than the safe harbor level must provide Prop. 65 warnings. OEHHA does not have safe harbor levels for all listed chemicals. If there is no safe harbor level, businesses that expose individuals to that chemical would be required to provide a Prop. 65 warning, unless the business can show that the anticipated exposure level will not pose a significant risk of cancer or reproductive harm

Determining anticipated levels of exposure to listed chemicals can be very complex. Although a business has the burden of proving a warning is not required, you are discouraged from providing a warning that is not necessary and instead should consider consulting a qualified professional⁴ if you believe an exposure to a listed chemical may not require a Prop. 65 warning. (Emphasis added, endnote omitted.)

Q. What is the acceptable concentration in my product for chemicals listed under Prop. 65?

A. *Prop. 65 applies only to exposures to listed chemicals. It does not ban or restrict the use of any given chemical. The concentration of a chemical in a product is only one part of the process to determine whether consumers must be warned about an exposure to a listed chemical.*

As explained above, OEHHA provides businesses with compliance assistance

by establishing safe harbor levels for exposures to listed chemicals.⁵
Exposures below those levels do not require a warning.

In general, a business should combine known information about how consumers use their product and how they might be exposed to a listed chemical. For example, a toy might contain small amounts of lead or other listed chemicals in its paint. To determine whether the toy requires a warning, the product's maker would need to consider both the concentration of lead in the paint and scientific information about how a child might handle or mouth the toy and thereby be exposed to the lead. (Emphasis added.)

Significantly, OEHHA's guidance is faulty and inaccurate on a number of different levels.

- It is very important to note that, as pertains to environmental exposures, OEHHA "discourages" businesses from providing a warning that is not necessary, and intends that qualified experts be hired to identify all of the listed chemical used in a business's operation, to determine whether there are exposures, and whether the exposure(s) pose a significant risk in order to know whether a warning is necessary; in contrast, however, retailers of consumer products can easily determine if any warnings are necessary if they have actual knowledge of an exposure, and such actual knowledge can include knowledge from "any reliable source" For example, a retail seller may acquire knowledge of an exposure that requires a warning through news media, its customers or a trade association." (Sections 25602(d)(5) and (e) of the 2016 Regulations, emphasis added.)

CH&LA has for years provided its members with detailed information about many of the listed chemicals are likely present in a typical hotel and when and where there might be exposures that constitute significant risks such that warnings might be required. OEHHA has made it clear to CH&LA that relying on advice from a trade association will not suffice for environmental exposures. No rationale has been provided for this distinction.

- OEHHA's guidance presumes that most businesses will have, or can easily obtain, "knowledge" of the listed chemicals that might be used in its operations in a "detectable " amount."⁶ There are over 800 listed chemicals. Only a handful of covered businesses will have the wherewithal or independent knowledge of what chemicals are used in their products or operations. As a corollary, a basic material safety data sheet is only required to list a chemical present at 1 percent or greater, or 0.1 percent if a carcinogen, so it is not a useful source of information about

chemicals that may be present at trace levels that might nonetheless be detectable.

- It presumes that all businesses will have knowledge whether or not the “level of exposure”⁷ for any or all of the chemicals used in its operations requires a warning (i.e., involves a “significant risk”⁸).

The FAQs correctly confirm that “[d]etermining anticipated levels of exposure to listed chemicals can be very complex.” Calculating the level of exposure for a chemical is something only a highly specialized professional can accomplish, and only a handful of businesses will be able to undertake this calculation. Further, then, if subject to court challenge, such calculation is subject to attack by private enforcers at a huge cost for the business to defend. This aspect of the regulations also presumes that businesses will have correctly identified which listed chemicals are present in its operations.

- It presumes that all businesses will have knowledge of whether the safe harbor level is exceeded for any or all of the chemicals present. These are questions that only a highly specialized professional can answer, and only a handful of businesses will be able to make these determinations. Again, CH&LA submits that this presumption is not warranted for virtually all businesses.
- It presumes, for chemicals for which there are no safe harbors, that businesses will have the knowledge of whether the anticipated exposure level of a particular chemical will or will not “pose a significant risk of cancer or reproductive harm.” These, too, are determinations that only a highly professional can make, and only a handful of businesses will be able to make them.
- It presumes that all businesses can determine for each chemical the “concentration of [the chemical] ... and scientific information about how a [person] might be exposed to the [chemical].” These determinations require highly specialized expertise, and only a handful of businesses will be able to secure the expertise to make them.
- It presumes that all businesses can make the necessary determinations by, among other things, making a request for an “interpretive guideline” (Title 27, CCR, Section 27203) or asking for a “safe use determination” (Title 27, CCR, Section 27204). Jumping through all of the hoops required for these procedures is beyond the technical,

administrative, financial and scientific abilities of all but a handful of businesses.

It is very significant to note that while OEHHA “discourages” businesses from providing a warning that is not necessary, it makes it clear that the only way a business can determine whether a warning is not necessary is to consult “a qualified professional.” Very, very few businesses can afford to undertake such an engagement for even one listed chemical, let alone all of the other listed chemicals that might be involved in its operations.

It is especially important to note that while OEHHA discourages businesses from providing a warning that is not necessary, it does not prohibit such action. This would be especially true when a business cannot afford a qualified professional. As explained below in this letter, CH&LA strongly believes that the 2016 Regulations contain express language to the effect that providing an unnecessary warning is not prohibited.

B. Under The Current Warning Regulations

As explained below, the 2016 Regulations make it impossible for virtually every business to comply with the criteria necessary to qualify for safe harbor status. Simply stated, the 2016 Regulations obligate businesses to engage in extremely complex, complicated, expensive, and time consuming scientific and operational analyses to determine whether any warning is required, and if so, where and how to post it, and exactly what it should say. In short, the 2016 Regulations make it is impossible for any business to qualify for safe harbor status.

In marked contrast, providing safe harbor warnings under the current regulations (Title 27, CCR, Sections 25601, *et seq.*) does not require any such analyses to determine if a business falls within the purview of Health and Safety Code Section 25249.10 and must therefore must post a warning. The current regulations give comprehensible guidance telling businesses how to post clearly defined warnings in specific defined locations, and thereby satisfy the current safe harbor rules, without having to jump through the impossible hoops presented in the 2016 Regulations.

C. Under the 2016 Regulations

OEHHA has now elected for the first time to require that businesses seeking to qualify for safe-harbor status engage in an extremely complex and expensive scientific investigation that virtually no business can accomplish. Specifically, a business must determine whether any detectable amount of any of the 800+ listed chemicals is involved in its operations, and if so, whether that the presence of the chemical creates an “exposure,” and poses a “significant risk” such that a warning is required.

OEHHA’s new philosophy pertaining to clear and reasonable warnings are invalid and unenforceable enforcement due to the fact that (1) the safe harbor provisions are void for vagueness, (2) they unconstitutionally denies businesses substantial due process rights, and, equally important, (they destroy the entire purpose of Prop. 65 to give the public information it can reasonably utilized to understand the risks that they might be facing.

Before any business can start distressing about how and where to provide a Prop. 65 warning, and what such a warning should say, it must first decide whether a warning is, in fact, required at all.⁹ This is certainly the most difficult problem facing any business trying to comply with Prop. 65’s warning obligations. It is also the aspect of Prop. 65 most responsible for frivolous claims by “private enforcers.”

Unless a business can comply with OEHHA’s proposed safe harbor requirements, it faces the following practical and legal chain of:

- If a private enforcer asserts that a business failed – either “knowingly and intentionally,” or otherwise – to provide a clear and reasonable warning regarding an alleged exposure, the enforcer needs only allege that one of the 800+ listed chemicals is present in a “detectable” amount, and that one or more individuals were exposed to it. Since private enforcers have very little difficulty demonstrating that the chemical in question is present at a detectable level, the enforcer has at that point legally presented a case sufficient to shift the burden of proof to the defendant.
- Once the “burden” shifts, the defendant business is required to establish that the alleged exposure did not pose a significant risk by making their case “based on evidence and standards of comparable scientific validity to the evidence and standards which form the scientific basis for the listing of such chemical...”¹⁰ This is an impossible burden for defendants to meet.

- For example, Sections 25701, *et seq.* of the current regulations set forth the specific methodologies that a business must employ to establish that there is no significant risk pertaining to cancer in connection with an alleged exposure. A review of those required methodologies makes it clear that only an extremely small number of businesses possess the sophistication, scientific knowledge, and financial and operational wherewithal to determine if there is a significant risk regarding any of the listed chemicals – let alone all of the chemicals that might be present in their operations.

Similarly, Sections 25801, *et seq.* of the current regulations set forth the specific methodologies that must be employed to establish that there is no significant risk (i.e., “observable effect”) pertaining to reproductive toxicity.¹¹ The quantitative assessment mechanism which businesses must utilize is set forth in Section 25803, and, again, the specific tasks involved are impossible for virtually any business to accomplish. Also, because such a showing is an issue of fact in a trial court, even getting to that stage in litigation is well beyond the financial and other capabilities of most businesses.

- Because of aggressive enforcement action and frivolous claims by private litigant, every business subject to Prop. 65 faces a significant conundrum: And because failure to furnish a warning when one *is* or *may be* required is a violation of Prop, 65 and will subject the business to substantial liability, the business can either (1) attempt to satisfy all of the safe-harbor requirements of the 2016 Regulations, or (2) post warnings when they might not in fact be required, utilizing whatever information the business might possess. In the latter scenario, a business will still run the risk that, no matter what the warnings state or where they are posted, a private enforcer will send a 60-day letter claiming that they are not clear and reasonable. Posting general warnings – even if the business does not know that it falls within the purview of Health and Safety Code Section 25249.10 – is preferable to providing no warnings at all.

Inherent in Prop. 65 itself, in the current regulations, and in OEHHA’s FAQs and other “guidance” is the underlying premise that any business that cannot make the above-described crucial determinations on its own will merely have to retain a “qualified professional” in order to quickly and definitively ascertain whether or not the criteria in Health and Safety Code Section 25249.10(c) have been met—that is the only safe way for

businesses to know whether they should or should not provide any particular warning(s). In other words, it is assumed that all of these businesses will have the financial, administrative, and operational wherewithal to consult “a qualified professional.” *CH&LA does not agree with this assumption.*

CH&LA did in fact consult with qualified professionals in the early 2000s to get at least a general understanding of which of the listed chemicals are most likely to encountered in typical hotels.

CH&LA and its experts examined numerous hotels and their operations to ascertain which chemicals were most likely to be present in typical hotels, and where and how exposures were likely to occur at levels that required warnings. Even this simplified undertaking cost many tens of thousands of dollars. If all hotels are required to hire a professional, each hotel will spend many hundreds of thousands of dollars just to do a preliminary survey of what listed chemicals might be in their operations, and then spend many more thousands of additional dollars—for each chemical—to conduct an exposure assessment to determine if a warning is required. Due to the nature of performing an exposure assessment and the scientific, behavioral, and other variables involved, the assessment can easily be challenged in court.

It is simply not feasible for any hotel businesses to determine definitively and beyond legal challenge whether a warning is required under Prop. 65 and, therefore, to safely and reliably understand when and how to comply with the warning requirements. This is why the relatively straightforward safe harbor in the current regulations is so critical.

3. Specific Comments, Concerns, and Recommendations Pertaining to The 2016 Regulations

A. Expressly Allow Businesses to Give Warnings That Might Not Be Necessary

As noted above, OEHHA’s “Frequently Asked Question About Prop. 65” states that businesses “are discouraged from providing a warning that is not necessary.” We have also explained that it is impossible for a business to determine whether or not a warning is necessary, it can only post warnings without regard to whether a warning is in fact required. Hence, the only choice that any business has is to post warnings that provide the best

information reasonably available to the business without going through all of the scientific analyses required in the 2016 Regulations.

To CH&LA's knowledge, OEHHA has never prohibited a business from following that course of action. The only caveat is that the business might have to defend against an allegation that its warnings are not clear and reasonable. OEHHA's FAQs make it very clear that many businesses post notices in order to protect themselves, and without knowledge that warnings are in fact required.¹²

To make it clear to everyone that such "perhaps-unnecessary" warnings are not prohibited, Section 25600(a) should be amended, to read:

Section 25600(a) Article 6, Subarticles 1 and 2 apply when a clear and reasonable warning is required under Section 25249.6 of the Act. Subarticle 1 sets forth general provisions applicable throughout this article, including the allocation of responsibility among parties when a warning for a consumer product is required under the Act. Subarticle 2 provides "safe harbor" content and methods for providing a warning that have been determined "clear and reasonable" by the lead agency. Nothing in Article 6 or Subarticles 1 and 2 shall be interpreted to determine whether a warning is required for a given exposure under Section 25249.6 of the Act. Nothing in Article 6 or Subarticles 1 and 2 shall be interpreted to prohibit a person from providing a warning that the person reasonably believes to be clear and reasonable notwithstanding the fact that warning might not be required under Section 25249.6 of the Act.

(New language indicated by underlining.)

B. Section 25600 -- General

Section 25600(a) of the 2016 regulations¹³ contains the following statement: "Nothing in Article 6 or Subarticles 1 and 2 shall be interpreted to determine whether a warning is required for a given exposure under Section 25249.6 of the Act." (Emphasis added.) The Initial Statement of Reasons (**ISOR**) explains this statement as follows:

This subsection also explains that the 2016 regulations do not address the determination by a business whether or not a warning is required under the Act. ... The 2016 regulations only become relevant after a business determines that the exposure to a listed chemical it knowingly and intentionally causes requires a warning. (Emphasis added.)

Stated differently, the 2016 regulations are still premised on the assumption that businesses can and will make the types complex scientific

determinations discussed above. As previously discussed in detail, this approach is completely unworkable.

C. Section 25600.1(a) – Definition of “Affected Area”

Section 25600.1(a) of the current regulations states that “Affected area” means the area in which an exposure to a chemical known to the state to cause cancer or birth defects or other reproductive harm is at a level that requires a warning.” CH&LA believes that there is absolutely no way that a business can determine if any chemical(s) are at a level that requires a warning.

Significantly, OEHHA recognized the difficulty that businesses face in trying to determine whether a warning is required. Consequently, Section 25600.1(a) of the 2015 Regulations stated: “Affected area” means the area in which an exposure to a chemical known to the state to cause cancer or birth defects or other reproductive harm is reasonably calculated to occur at a level that requires a warning. (Emphasis added.)

As CH&LA noted in its comments regarding the 2015 Regulations, it appreciates the fact that the use of the term “reasonably calculated” was an attempt by OEHHA to provide greater clarity to businesses as to whether a warning is required in a particular situation. Unfortunately, neither the 2015 Regulations nor the accompanying ISOR provides any guidance at all as to what constitutes a “reasonable calculation” in terms of informing businesses how they can establish whether there is in fact an exposure that involves a significant risk.

Section 25600.1(a) in the 2016 Regulations will be identical to what it is in the current regulations, with all of the resultant problems. The ISOR for the 2016 Regulations provides no rationale for this significant reversal. CH&LA strongly recommends that the definition of “affected area” in the 2016 Regulations be changed as follows: “Affected area” means the area in which an exposure to a chemical known to the state to cause cancer or birth defects or other reproductive harm is reasonably and feasibly calculated to occur at a level that requires a warning.

Further, CH&LA recommends that OEHHA provide – in the 2016 Regulations and/or elsewhere – a clear definition of “reasonably and feasibly calculated,” along with explanatory information, including factors to be considered and examples, demonstrating how a business can reasonably and feasibly make such a calculation.

Such a change would provide businesses with at least a modicum of protection in that a warning would be required only after a reasonable calculation.

D. Section 25604 – Environmental Exposure Warnings – Methods of Transmission

Section 25604(a)(1) contains a number of significant requirements:

A sign posted at all public entrances to the affected area in no smaller than 72-point type that clearly identifies the area for which the warning is being provided. The warning must be provided in a conspicuous manner and under such conditions as to make it likely to be read, seen and understood by an ordinary individual in the course of normal daily activity, must clearly identify the area for which the warning is being provided and must be reasonably associated with the location and source of the exposure. The warning must be provided in English and in any other language used on other signage in the affected area. (Emphasis added.)

These signage requirements raise a number of very important practical and legal problems that must be addressed in order for the 2016 Regulations to pass muster under the APA. These problems include:

(1) The terms “affected area,” “identifies the area,” “clearly identify the area,” and “reasonably associated with the location and source of the exposure,” in Section 25605(a)(1), are all practically and legally insufficient to guide a covered business and explain exactly what must be done to comply with the safe harbor provisions. They therefore fail the clarity test.

Section 25600(e) states that “a person is not required to provide separate warnings to each exposed individual.” (Emphasis added.) With respect to hotels, this seems to be a clear confirmation that a hotel should not have to post any notice in each guest room, or public space. It should be sufficient to post warnings at all public entrances, which is a permissible method of transmission under the current regulations.

In conversations with OEHHA staff about what the term “affected area” means in the context of hotels. Notwithstanding Section 25600(e), OEHHA has argued that warnings might well be required in every hotel guest room and public space, and, moreover, that the warnings in each guest room and public spaces must identify each source of exposure.

If that is the case, CH&LA does not understand how OEHHA intends that these particular requirements be applied in practical terms to a hotel and each of the potential environmental exposures therein? For one example, if a chemical that is on the Prop. 65 list is utilized to treat a swimming pool, is a sign required to have an isopleth indicating the area of potential exposure that requires a warning? If a hotel intends its warnings to apply to the entire property, is that acceptable? Must the warning sign identify each and every space, or type of space, in the establishment for which a warning is required? If the latter, exactly what must the warning say in this regard? Can a hotel sign say things like “public areas, food service areas, and each guest room,” for example, or must it provide a specific space-by-space description, such as “lobby, restaurant, bar, public bathrooms, pool, spa, all guest rooms” and et cetera?

The possible variables in just this one scenario are endless, and without very specific, concrete guidance as to what OEHHA intends in this regard, this provision is completely unworkable and fails to meet APA clarity requirement. Further, it is exactly this type of uncertainty and lack of clarity that private enforcers would seize upon subjecting hotels to further unnecessary and frivolous litigation.

(2) Section 25605(a)(1) requires, among other things, that the mandated environmental exposure warning, “must clearly identify the area for which the warning is being provided and must be reasonably associated with the location and source of the exposure.” (Emphasis added.)

We note that the current regulations already require that the warning signs must be “reasonably associated with the location and source of the exposure.” This particular requirement has been extremely problematic for hotels to comply with, and it has led to many enforcement claims and lawsuits. This phrase is extremely ambiguous and troublesome, and it will continue to fuel enforcement claims.

What does the term “reasonably associated” mean?

- Does it mean that a sign has to be physically located in or near each room, space, or other area where an exposure requiring a warning exists? For example, take the scenario where each guest room contains a listed chemical that requires a warning such as on a smoking floor. If a warning would be required for each guest room, then every hotel will drown in a sea of identical and repetitive warning signs. And, even if that is not OEHHA’s intention, private enforcers

may seize on this ambiguity to pursue frivolous claims. That is simply counterproductive Prop. 65's goals and inconsistent with OEHHA's intention to provide consumers with useful information without numbing their senses with too many warnings.

- Or does the word "associated" mean that each of the warnings posted must identify each exposure, each chemical, and each product or process that involves it? How can any business realistically meet this burden, let alone comprehend it?

Clearly, this fails to meet the clarity requirement of the APA.

(3) The language requires the sign to be in a font at least "72-point type." Note that Section 25607.5(a)(1) of the 2016 Regulations specifies signs at a public entrance to a restaurant or facility be printed in no smaller than 28-point type." (Emphasis added.) If 28-point type is sufficient for the signs posted at public entrances to restaurants, what is the basis for requiring 72-point type in hotels? OEHHA has provided no rationale for this distinction.

CH&LA recommends that 28-point type be specified in Section 25604(a)(1) instead of 72-point type. OEHHA does not have a basis for a different point type at the public entrances to hotels.

(4) Section 25605(a)(1) does not specify the font to be used. The current regulations specify ITC Garamond bold condensed font in certain cases. Is that the font contemplated by the 2016 regulations? If so, this must be made clear. If some other font is contemplated, it needs to be identified. Otherwise, this particular aspect of the 2016 regulations fails to meet the APA requirements.

It is important to note in this regard that 72-point type in one font style can differ significantly from another font style in terms of size.

There is no consensus—among businesses, regulators, or the Prop. 65 plaintiffs' bar—as to what exactly businesses must do to comply with the current requirement that the warnings "must be reasonably associated with the location and source of the exposure." In light of the other 2016 changes to the warning regulations, this provision will provide additional opportunities to private enforcers to bring frivolous litigation.

For all of the foregoing reasons, CH&LA submits that Section 25605 fails to satisfy the requirements of the APA.

CH&LA therefore submits that OEHHA should take the opportunity presented by this rulemaking proceeding to resolve this conundrum by amending Section 25605(a)(1), to read as follows:

A sign posted at all public entrances to the establishment or the affected area in no smaller than 72-point [identify font style] type that clearly identifies the establishment or the area for which the warning is being provided. The warning must:

- (A) Be provided in a conspicuous manner and under such conditions as to make it likely to be seen, read, and understood by an ordinary individual in the course of normal daily activity.
- (B) Clearly identify the establishment or the area for which the warning is being provided, including the location and source of the exposure.
- (C) Be provided in English and in any other language used on other signage in the affected area.

E. Section 25604 – Environmental Exposure Warnings – Content

Section 25605(a)(6) requires that “[i]n all cases the specific area in which the exposure can occur must be clearly described in the warning message.” This sentence is ambiguous, unclear and seems to require a level of infeasible exactness that private enforcers would seize upon to bring a slate of new frivolous claims. The term “specific area” can mean very different things to different people. How is it to be applied in practical terms to a hotel? If a hotel intends its warnings to apply to the entire hotel property, is that acceptable? Must a hotel instead identify in the sign each and every space, or type of space, in the establishment for which a warning is required? If the latter, exactly what must be stated? Does the sign for a particular space or room have to contain only those chemicals in Section 25602(a) that are present in that particular space or room? Can a hotel say things like “public areas, food service areas, and each guest room,” for example, or must it provide a specific space-by-space description, such as “lobby, restaurant, bar, public bathrooms, pool, spa, all guest rooms” and et cetera? Without very specific, concrete guidance as to what OEHHA intends in this regard, this provision is not only unworkable, but will also serve to further economically incentivizes private enforcers.

Moreover, does OEHHA actually anticipate that a very detailed list of specific areas will be useful to guests and other patrons? Is it expected that they will go to the guest rooms but will not also go to the restaurant,

bar, sundries shop, pool, and other spaces? CH&LA believes that this does not meet the criteria of the APA.

Section 25605(a)(6) violates the APA requirement for clarity (Government Code Section 11349.1). Further, if "specific area" means anything other than the entire hotel itself, it violates the "necessity" mandate in the APA. ¹⁴

F. Section 25607 – Specific Product, Chemical and Area Exposure Warnings

CH&LA is concerned about of the individual subsections in this portion of the 2016 regulations that deal with "area" (i.e., environmental) exposure warnings. Specifically, in addition to making hotels provide the warning specified in Sections 25604 and 25605 for hotels, Section 25608 will require that individual hotels must also provide separate warnings for a number of other situations. Depending on the specific hotel in question (and putting aside for the moment the warnings required for food and alcoholic beverages), most hotels would have to provide separate warnings for:

- Raw wood (Sections 25607.10 and 25607.11),
- Furniture (Sections 25607.12 and 25607.13),
- Diesel engines (Sections 25607.14 and 25607.15),
- Passenger vehicles (Sections 25607.16 and 25607.17),
- Recreational Vessels (Sections 25607.18 and 25607.19)
- Enclosed parking facilities (Sections 25607.20 and 25607.21), and
- Designated smoking areas (Sections 25607.26 and 25607.27).

CH&LA would not be surprised to see a claim that a hotel is an "industrial operation" and therefore needs to provide separate warnings for petroleum products as well (Section 25607.22 and 25607.23).

To the extent that any or all of the above-noted warning requirements are applicable to a given hotel, the required method of transmission for each of the "specific" warnings is not clear. For example, it is not clear whether separate warnings can be provided (or, indeed, are required) in the sign

required by Section 25605 or whether separate warning signs are required. In either case, this aspect of the 2016 Regulations alone will make it hard to even see the hotel's entrance due to all of the warning signage.

At the very least, and in the context of a hotel, the above-noted provisions in Section 25607 are unclear, and there is no evidence to show that they are necessary. Hence, they violate the APA for these and other reasons.

G. Section 25607.5 Food and Non-Alcoholic Beverage Exposure Warnings for Restaurants – Methods of Transmission

This section fails the clarity test, because it does not identify what constitutes a "restaurant." For example, is a hot dog stand a restaurant?

H. Section 25607.18 Recreational Vessel Exposure Warnings – Method of Transmission

These requirements fail the clarity test. For example, do such things as rowboats and canoes that hotels often rent constitute "recreational vessels?"

I. Section 25607.28 Designated Smoking Area Exposure Warnings (Environmental Exposures) – Method of Transmission

This section fails the clarity test, because it does not identify what constitutes a "designated smoking area." For example, does the term include every place where smoking is merely permitted, such as outdoor spaces at a hotel, guest room balconies?

J. Section 25607.20 Enclosed Parking Facility Exposure Warnings – Methods of Transmission

This section also fails the clarity test. For example, what does the term "enclosed" mean? Does it mean a parking facility is entirely enclosed except for the entrances and exits? What about the top floor of a multiple-story parking facility where the top floor is outdoors? What about a parking facility that is enclosed only on two sides or three sides?

K. Hotel Warnings

CH&LA has explained above how and why the signage requirements in Section 25604(a)(1) of the 2016 Regulations make no sense, are impossible to implement from a practical standpoint, would result in many hundreds of

thousands of additional warning signs being hosted at each hotel, would be extremely expensive, and would be counterproductive with respect to providing meaningful and useful information to hotel guests. (See discussion in Section 2B, above.)

In CH&LA's discussions with OEHHA regarding Section 25604(a)(1) on this issue, OEHHA has indicated that it is likely going to be necessary for a hotel to post in every single guest room, public restrooms and other public spaces, and many outdoor areas as many warnings as necessary to cover each and every chemical present there that poses a significant risk. As noted at the outset of this letter, there are well over 5,000 hotels, with more than half a million-guest rooms, in California.

For all of these reasons, CH&LA strongly urges that OEHHA treats hotels the same way it treats amusement parks in Sections 25607.22 and 25607.23. Much like amusement parks, hotels cannot possibly provide warnings in each and every room, area, and space in the establishment. The only feasible, practical, and sensible way to provide clear and reasonable warnings in transient lodging establishments is to require the same warning methods of transmission and content applicable to amusement parks.

CH&LA recommends that the language set forth below be used for this purpose.

Section 25607.30 Hotels– Method of Transmission

- (1) For hotels, a warning meets the requirements of this article if it complies with the content requirements in Section 25607.31 and is provided as follows:
 - (2) The warning is provided on a sign posted at each public entrance to the hotel in no smaller than 72-point type.
 - (3) The warning is placed so that it is readable and conspicuous to individuals before they enter the hotel.
 - (4) Where there is open access to the hotel with no designated public entrances, the sign shall be posted at the most common areas used by the public to access the facility or park.
- (b) For purposes of this section, "hotel" includes any type of transient lodging establishment, including but not limited to, hotels, motels, bed and

breakfast inns, resorts, spas, ski resorts, guest ranches, agricultural “homestays,” tourist homes, condominiums, timeshares, vacation home rentals, and extended stay establishments in which members of the public can obtain transient lodging accommodations.

- (c) If other permanent entrance signage at the facility is provided in any language other than English, the warning must be provided in both English and that language.
- (d) In addition to the warning specified in this section, warnings that comply with this article must also be provided for exposures to chemicals in consumer products, alcoholic beverages, food, and enclosed parking facilities, and recreational vessels where such exposures occur on the premises.

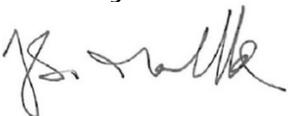
Section 25607.31 Hotels - Content

(a) A warning for hotel exposures meets the requirements of this article if it is provided using the method required in Section 25607.30 and includes all the following elements:

- (1) The symbol required in Section 25603(a)(1).
- (2) The word “**WARNING**” in all capital letters and bold print.
- (3) The words, “Some areas in hotels can expose you to [name of one or more chemical] a chemical [chemicals] known to the State of California to cause cancer or birth defects or other reproductive harm. For additional information go to www.P65Warnings.ca.gov/hotels.”

CH&LA very much appreciates this opportunity to express its thoughts, concerns, and recommendations regarding the 2016 Regulations to OEHHA, and we stand ready to work with, and assist, OEHHA in the finalization and adoption of the 2016 Regulations.

Sincerely,



Lynn S. Mohrfeld, CAE
President & CEO, California Hotel & Lodging Association

¹ Recreational vehicle parks are governed by the Recreational Vehicle Park Occupancy Law (Civil Code Sections 799.20, *et seq.*). Health and Safety Code Section 18010 defines “recreational vehicle” to include (a) A motor home, travel trailer, truck camper, or camping trailer, with or without motive power, designed for human habitation for recreational, emergency, or other occupancy ... (b) A park trailer, as defined in [Health and Safety Code Section 18009.3.” (Emphasis added).

² For example, Civil Code Section 1866, which is one of the statutes that pertain specifically to hotels, also covers a great many camps, campsites, and operations of the type discussed below. Thus, those establishments are deemed to be hotels. For example, the Civil Code gives to the operators of special occupancy parks the same rights and obligations that apply to traditional hotels with respect to holdover guests, minors, and innkeeper’s liens. As noted above, “special occupancy parks” are defined to mean a recreational vehicle park, temporary recreational vehicle park, incidental camping area, or tent camp. But the operative language in Civil Code Section 1866 dealing with the rights and obligations of special occupancy parks expressly applies also to campsites, camping cabins, lots (which also cover tents, camp cars, and camping parties, or other rental units.

Therefore, to the extent that particular campsites are open to the public generally and operate on the same basis as a hotel, they will be treated as hotels for many purposes. For example, the law pertaining to the transient occupancy tax makes it clear that some types of campsites and similar establishments are subject to the transient occupancy tax (“hotel tax”). (See Revenue and Taxation Code Sections 7280 and 7281).

³ Health and Safety Code Section 25249.11(b); Title 27, CCR, Section 25201(h).

⁴ OEHHA’s FAQs do not define the term “qualified professional,” nor is the term defined in the Current or 2016 Regulations. One can assume that this would require someone with the credentials sufficient to be characterized as a “qualified scientist,” as defined in 2016 Health and Safety Code Section 25249.11(c) of Assembly Bill 543, which is pending before the California Legislature at this time:

- (c) “Qualified scientist” means a person who meets all of the following requirements:
 - (1) He or she has completed a masters, doctoral, or medical doctor degree and has experience in an area specializing in any of the following:
 - (A) Epidemiology
 - (B) Oncology
 - (C) Pathology
 - (D) Medicine
 - (E) Public health
 - (F) Statistics.
 - (G) Biology
 - (H) Toxicology
 - (I) Developmental toxicology
 - (J) Reproductive toxicology
 - (K) Teratology
 - (L) Environmental chemistry
 - (M) Fields related to subparagraphs (A) to (L), inclusive...

⁵ CH&LA submits that obtaining an “interpretive guideline” or a “safe use determination” under Sections 25203 and 25204 of the Current Regulations to determine whether there is a “significant risk” is so complex and costly that only a relative handful of businesses will be able to utilize these methodologies. They are simply not practical for the vast majority of businesses have or that have to comply with Prop. 65.

⁶ Health and Safety Code Section 25249.11(c).

⁷ Title 27, CCR, Section 25102(i): “Expose” means to cause to ingest, inhale, contact via body surfaces or otherwise come into contact with a listed chemical. An individual may come into contact with a listed chemical through water, air, food, consumer products and any other environmental exposure as well as occupational exposures.

⁸ Health and Safety Code Section 25298.10(c) provides that no warning is required under Prop. 65 when it can be shown that the exposure in question:

...poses no significant risk assuming lifetime exposure at the level in question for substances known to the state to cause cancer, and that the exposure will have no observable effect assuming exposure at one thousand (1000) times the level in question for substances known to the state to cause reproductive toxicity, based on evidence and standards of comparable scientific validity to the evidence and standards which form the scientific basis for the listing of such chemical pursuant to subdivision (a) of Section 25249.8. In any action brought to enforce Section 25249.6, the burden of showing that an exposure meets the criteria of this subdivision shall be on the defendant. (Emphasis added.)

⁹ Health and Safety Code Section 25249.6 (“Required Warning Before Exposure To Chemicals Known to Cause Cancer Or Reproductive Toxicity”):

No person in the course of doing business shall knowingly and intentionally expose any individual to a chemical known to the state to cause cancer or reproductive toxicity without first giving clear and reasonable warning to such individual, except as provided in Section 25249.10. (Emphasis added.)

¹⁰ Section 25701(b) of the current regulations states that: A chemical is known to the state to cause cancer or reproductive toxicity within the meaning of this chapter if in the opinion of the state's qualified experts it has been clearly shown through scientifically valid testing according to generally accepted principles to cause cancer or reproductive toxicity, or if a body considered to be authoritative by such experts has formally identified it as causing cancer or reproductive toxicity, or if an agency of the state or federal government has formally required it to be labeled or identified as causing cancer or reproductive toxicity.

¹¹ Section 25801: A level of exposure to a listed chemical shall be deemed to have no observable effect, assuming exposure at one thousand times that level, provided that the level is determined:

-
- (1) By means of [a quantitative] assessment that meets the standards described in Section 25803 to determine the maximum dose level having no observable effect, and dividing that level by one thousand (1,000) to arrive at the maximum allowable dose level, or
 - (2) By application of a specific regulatory level for the chemical in question as provided in Section 25805.

¹² OEHHA's Prop. 65 FAQs provide the following advice:

The lobby of my apartment house has warnings posted – what should I do?

A: Tenants should ask their landlords for information about a Proposition 65 warning in their apartment building. A fact sheet for tenants with common scenarios that prompt landlords to provide Proposition 65 warnings can be found here: <http://www.oehha.ca.gov/prop65/background/P65ten.html>. [NOTE: This is exactly what CH&LA has been doing in terms of the pamphlets it provides to hotels to furnish to guests who ask questions about the warning signs.]

What does a Proposition 65 warning mean?

Under Proposition 65, businesses are required to give a “clear and reasonable” warning before knowingly exposing anyone to a listed chemical above a specified level. This warning can be included on the label of a consumer product or published in a newspaper. An equally common practice is for businesses to provide a warning at the workplace or in a public area affected by the chemical.

Many apartment owners and managers have posted or distributed warnings to notify tenants that they may be exposed to one or more chemicals on the Proposition 65 list. For example, a warning may be given because tenants are exposed to chemicals in pesticides applied to landscaping or structures or chemicals in housing construction materials, such as lead in paint or asbestos in ceiling coatings.

A growing trend among rental property owners and other businesses is to provide warnings for chemicals on the list, such as tobacco smoke or motor vehicle exhaust, which are regularly released into the environment in or near rental housing. In some cases, however, owners and managers are providing warnings to avoid potential violations and lawsuits, even though exposure to chemicals on the Proposition 65 list has not been verified. You should discuss the warning with the owner or manager to learn why it was provided so that you and your family can make informed decisions about exposure to any of these chemicals and your health.

Is my family's health at risk from exposure to these chemicals?

Warnings must be provided for chemicals listed under Proposition 65 if exposure to them may present a significant risk of cancer or reproductive harm. For *carcinogens*, the chemical must be present at or above a level that could cause one additional case of cancer in a population of 100,000 people exposed to the chemical over a lifetime. For *reproductive toxicants*, the chemical must be present at or above 1/1000th of the level at which the chemical is determined to have no negative health risks (the “no-

observable-effect level”).

Proposition 65 generally does not prohibit a business from exposing people to listed chemicals nor does exposure to these chemicals necessarily create an immediate health risk. Also, as stated above, a warning may have been provided in some cases even though the level at which the chemical is present is actually too low to pose a significant health risk. It is important to find out why you have received the warning so that you can discover which chemicals you are exposed to, and at what levels, to determine how best to protect your family’s health. (Emphasis added.)

¹³ Unless otherwise indicated, Section references from this point on are to the 2016 Regulations.

¹⁴ See Title 1, CCR, Section 10:

(a) In reviewing the rulemaking record for compliance with subsection (b), OAL shall not dispute the decision of a rulemaking agency to adopt a particular regulatory provision when the information provided as required by subsection (b) is also adequate to support one or more alternative conclusions.

(b) In order to meet the “necessity” standard of Government Code section 11349.1, the record of the rulemaking proceeding shall include:

(1) A statement of the specific purpose of each adoption, amendment, or repeal; and

(2) Information explaining why each provision of the adopted regulation is required to carry out the described purpose of the provision. Such information shall include, but is not limited to, facts, studies, or expert opinion. When the explanation is based upon policies, conclusions, speculation, or conjecture, the rulemaking record must include, in addition, supporting facts, studies, expert opinion, or other information. An “expert” within the meaning of this section is a person who possesses special skill or knowledge by reason of study or experience which is relevant to the regulation in question. (Emphasis added.)