



**California Council for Environmental and Economic Balance**

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April 26, 2016

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

***Via Electronic Transmission***

**RE: Proposed Revisions to the Proposition 65 Clear & Reasonable  
Warning Regulations – March 25, 2016**

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 Modification to Text of Proposed Rulemaking for Article 6 in Title 27 of the California Code of Regulations pursuant to the Safe Drinking Water and Toxic Enforcement Act ("Proposition 65") dated March 25, 2016. In addition to the comments and concerns outlined in this letter, CCEEB also endorses the comments submitted by the CalChamber-led coalition regarding the proposed revisions 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.

While CCEEB greatly appreciates the ability to work with OEHHA on the proposed changes to the Proposition 65 regulation related to Clear and Reasonable Warning regulations and the issues addressed as part of the November 2015 proposal, we are alarmed that the proposed regulatory revisions add additional issues of great concern and take a step backward on a few fronts as well. These issues, as outlined below, make the latest proposal unworkable. Further, given it has been suggested this is the final proposal to be offered before finalizing the rulemaking package make it of great concern – particularly given the addition of new regulatory concepts that have not been discussed or vetted until now. The proposed changes will result in compliance challenges, increased unwarranted and potential consumer confusion, and increased litigation – considerations that fly directly in the face of the Governor's original interest in reforms that would assist with compliance and regulatory certainty; reduce consumer confusion and provide greater insight into warnings; and reduce the litigation risk responsible parties find themselves subject to today.

Additionally, OEHHA has yet to satisfactorily address some of the issues related to a lack of clarity, legal authority and necessity.

### **Section 25601(c) – Safe Harbor Clear and Reasonable Warnings – Methods and Content**

Despite changes to this section related to the inclusion of the name of one or more chemicals being listed on a warning, this section continues to be problematic in that it lacks clarity and may not be consistent with what, at times, can be varying scientific determinations.

#### ***Legal Authority & Burden***

While the verbiage was altered from that which was included in the November 2015 proposal, the issue remains the same – it imposes an unlawful legal burden on businesses. Currently, Proposition 65 merely requires a business to demonstrate that no warning is required. Under the revised proposed language, however, it would require businesses to demonstrate that a warning is required. This is unnecessary and inconsistent with the authorizing statute. Proposition 65, in fact, does not require a business to complete a risk or exposure assessment. This section as drafted, however, would require such an assessment and presuppose a legal outcome (warning) that Proposition 65 is not authorized to make.

In this regard, CCEEB urges OEHHA to delete the phrase “for which the person has determined a warning is required” and insert “for which the warning is being provided.”

#### ***Proposition 65 Regulatory Consistency***

The change to the language in this regulation, as proposed, is inconsistent with recently adopted Proposition 65 regulations such as the Lead Agency Website and emergency regulation for BPA in canned food and beverages. Both of these recently approved regulatory packages utilize the preferred, statutorily-authorized and consistent phrase “for which the warning is being provided.”

#### ***New Endpoints Tied to Chemical Specification***

Under the proposed revisions in this section, OEHHA is expanding the requirements of the safe harbor warning by requiring warnings being provided for more than one endpoint to include the name of one or more chemicals for each individual endpoint. In this regard, the regulation is not consistent with OEHHA’s premise that a warning is required to merely list one chemical for which the warning is being required. The need to list more than one chemical to cover both endpoints will result in over warning and increased litigation, thereby eliminating

the safe harbor benefit associated with the Clear and Reasonable Warning Regulation.

**Sections 25600(d) and 25601(f) – General; Safe Harbor Clear and Reasonable Warnings – Methods and Content**

CCEEB objects to the complete elimination of Section 25600(d) related to the ability to provide supplemental information. While we raised concerns previously regarding language in this section that placed restrictions on what information could be provided (i.e. “contradict”), the confirmation that supplemental information could be provided was helpful.

Related to the supplemental information concerns raised with the prior draft, we object to the insertion of Section 25601(f) that limits the supplemental information a regulated entity may choose to provide for all warnings. The proposed language is legally questionable as it relates to commercial free speech.

Further, under current California law associated with Section 17200 of the Business and Professions Code, OEHHA can 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 responsible entities up to potential litigation under the private right of action provisions associated with Proposition 65.

**Section 25602(a)(3) – Consumer Product Exposure Warnings – Methods of Transmission**

An ongoing concern, the proposed revisions fail to provide clarity as to whether a safe harbor consumer product warning may be conveyed via some form of labeling. While the regulation in other sections, such as Section 25601(d) and 25602(d), indicate that “labeling” as broadly provided in Section 25600.1(i) is an acceptable means of conveying a consumer product warning, this particular section lacks clarity and is inconsistent with the form of warning being acceptable in other sections of the regulation. In this regard, CCEEB urges OEHHA to clarify and provide consistency in this section as follows:

“A label or labeling that complies with the content requirements in Section 25603(a).”

**Sections 25604(a)(2)(A), 25604(a)(3)(A) and Section 25605(a)(3-6) – Environmental Exposure Warnings – Methods of Transmission; Content**

As revised, these sections add an entirely new and significant component to the safe harbor warning requirements for environmental exposures by requiring the warning to identify “one or more” of the sources of the exposure that led an entity to provide a warning. The effect of this requirement is to require entities to

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conduct a robust exposure assessment of their facilities in order to clearly identify the source(s) of the exposure. For many of the same reasons identified related to the chemical identification in warnings, this requirement is ambiguous and may be interpreted to require all sources of exposures to be included in the warning.

Further, this requirement is unnecessary and duplicative as OEHHA has the ability to request and provide such information through its recently adopted Lead Agency Website regulation. As a matter of fact, in its Lead Agency Website regulation it characterizes this information as supplemental and upon OEHHA request businesses providing environmental exposure warnings must provide the information associated with the source of such Proposition 65 chemical exposures.

### **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 [dkoopke@mchughgr.com](mailto:dkoopke@mchughgr.com) or (916) 930-1993.

Sincerely,



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CCEEB President

cc: Matt Rodriguez, Secretary, California Environmental Protection Agency  
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