



September 26, 2016

Via First Class and Electronic Mail

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Re: BPA Warnings - Proposed Regulation

Dear Ms. Vela:

I am writing on behalf of the Center for Environmental Health (“CEH”) and [INSERT OTHERS] to comment on the above-referenced proposed regulation. By way of this regulation, the California Office of Environmental Health Hazard and Assessment (“OEHHA”) proposes to undermine the important health and safety protections of Proposition 65. *See* Health & Safety Code § 25249.6. The proposed regulation serves no purpose other than to unlawfully shield industry from complying with Proposition 65 and to withhold from California consumers the information to which they are entitled under the law. Therefore, OEHHA should not adopt the proposed regulation, and instead should repeal the existing emergency regulation that the proposed rule is intended to replace.¹

I. BACKGROUND

A. Overview of Proposition 65.

Proposition 65 is a right to know statute that was enacted in 1986 to remedy gaps in the law and failures by state agencies to protect Californians against toxic chemicals.

The people of California find that hazardous chemicals pose a serious potential threat to their health and well-being, that state government agencies have failed to provide them

¹ The proposed regulation is substantially similar to OEHHA’s existing emergency regulation on BPA warnings, and therefore suffers from the same flaws. CEH incorporates by reference the comments previously submitted by CEH and others in connection with the emergency rulemaking proceeding. *See* April 16, 2016 Comments by CEH *et al.*, OAL File No. 2016-0408-02E.



with adequate protection and that these failures have been serious enough to lead to investigations by federal agencies of the administration of California's toxic protection programs.

Safe Drinking Water & Toxic Enforcement Act of 1986, Section 1. Because the government had done an insufficient job of protecting Californians from toxic chemicals, the Act generally prohibits businesses from knowingly and intentionally exposing individuals to known carcinogens and reproductive toxicants without a clear and reasonable warning. Health & Safety Code § 25249.6. To provide businesses with sufficient time to comply, Proposition 65's warning requirement does not take effect as to a particular chemical until 12 months after the chemical is formally added to the list of chemicals known to cause cancer or reproductive harm. *Id.*, § 25249.10(b).

B. OEHHA's Existing Warning Regulations.

In promulgating these regulations, OEHHA is not writing on a clean slate as the agency has existing Proposition 65 safe harbor warning regulations that have been on the books for decades. While businesses are not required to use these safe harbor warnings, the warnings are deemed by OEHHA's regulations to comply with Proposition 65's clear and reasonable warning requirement. 27 Cal. Code Regs. § 25603(a). While not perfect, these longstanding regulations are familiar to businesses and consumers alike, and have been generally successful in the consumer product arena in ensuring that consumers are provided with meaningful warnings before being exposed to listed chemicals. Even more importantly, because most companies would rather not put a warning on a product about potential health hazards, the existing warning regulations have led many companies to remove toxic chemicals from their products, both in California and around the world, to avoid the consumer warnings required by the statute. In such cases, no one brought litigation; instead, companies proactively decided to implement safer practices and/or make safer products in order to comply with the law.

For consumer product exposures, OEHHA's existing safe harbor regulations require that the warning be displayed in a manner such "as to render it likely to be read and understood by an ordinary individual under customary conditions of purchase or use." 27 Cal. Code Regs. § 25603.1(c). The safe harbor warning message for consumer products for exposures to reproductive toxicants is:

WARNING: This product contains a chemical known to the State of California to cause reproductive toxicity.

Id., § 25603.2(a)(2).



OEHHA's existing warning regulations do suffer from some flaws. Recently, in a separate regulatory proceeding that is being conducted on a non-emergency basis, OEHHA has proposed to amend its Proposition 65 warning regulations. OEHHA's regulatory proposal stems from a May 2013 announcement by Governor Brown proposing to reform Proposition 65 by, among other things, "improving how the public is warned about dangerous chemicals" by requiring "more useful information to the public on what they are being exposed to and how they can protect themselves." Press Release, Office of Governor Edmund G. Brown, Jr., Governor Brown Proposes to Reform Proposition 65. (May 7, 2013).² OEHHA has indicated that an update to its regulations is necessary since "the existing safe harbor warnings lack the specificity necessary to ensure that the public receives useful information about potential exposures." Initial Statement of Reasons ("ISOR"), Tit. 27, Cal. Code of Regs., Adoption of New Article 6, Nov. 27, 2015, p. 4. The most recent draft of these amendments (issued May 20, 2016) will explicitly require that any consumer product warnings (including for food) be provided in a "product-specific" manner. Proposed 27 Cal. Code Regs. §§ 25602(a) - (c) and 25607.1(a). The proposed new safe harbor warning message for exposure to listed reproductive toxicants in food is:

WARNING: Consuming this product can expose you to chemicals including [name of one or more chemicals], which is [are] known to the State of California to cause birth defects or other reproductive harm. For more information go to www.P65Warnings.ca.gov/food."

Id., § 25607.2(a)(3).

C. OEHHA's Regulation of BPA Under Proposition 65.

OEHHA has been looking at listing BPA as a reproductive toxicant under Proposition 65 since at least July 2009. Therefore, it is hardly news to anyone that BPA would become a Proposition 65 listed chemical. Most recently, OEHHA added BPA to the Proposition 65 list of chemicals known to cause reproductive toxicity on May 11, 2015. Thus, pursuant to the one year grace period built into the statute, the warning requirement became effective on May 11, 2016.

OEHHA has also known for a long time that BPA exposures are caused by many canned and bottled food and beverages. For instance, the ISOR cites to a 2011 published study entitled, "Concentration of Bisphenol A in Highly Consumed Canned Foods on the U.S. Market." ISOR, p. 4 fn. 8.

D. The Proposed Regulation.

² Available at <http://gov.ca.gov/news.php?id=18026>.

Although OEHHA finalized its listing of BPA as a reproductive toxicant under Proposition 65 in May 2015, OEHHA waited until the spring of 2016 to issue the emergency regulation that the agency is now proposing to codify on a non-emergency basis. Under both the existing emergency regulation and the proposed non-emergency regulation, companies that manufacture or distribute canned and bottled food and beverages (the “Products”) that expose consumers to BPA can comply with Proposition 65’s warning requirement in the ordinary fashion: by affixing “a label to the product bearing a warning that satisfies Section 25249.6 of the Act.” Proposed Section 25603.3(f)(1)(A)(1).

However, the proposed regulation also provides that such companies can comply with their warning obligation by: (1) providing OEHHA with a list of all “food products” for which a warning is being provided, so long as BPA was “intentionally used in the manufacture of the can lining or jar or bottle seals;” and (2) providing retailers that sell their products with a written notice and accompanying warning materials. Proposed Section 25603.3(f)(A)(2). The obligation to provide information to OEHHA is new as the existing emergency regulation does not include any such requirement. OEHHA apparently intends to post the list of Products it receives on its new Proposition 65 website, although nothing obligates the agency to do so.

In addition to providing a list of products to OEHHA, upstream supplies must provide a notice to retailers that: (1) states that “the canned food or beverage may result in an exposure” to BPA; (2) includes the brand and name or description of “the canned or bottled food or beverage, and its Universal Product Code or other identifying designation”; and (3) provides or offers to provide point-of-sale warning signs with specified language. Proposed Section 25603.3(f)(1)(A)(3). The specified warning language for such signs reads:

WARNING: Many food and beverage cans have linings containing bisphenol A (BPA), a chemical known to the State of California to cause harm to the female reproductive system. Jar lids and bottle caps may also contain BPA. You can be exposed to BPA when you consume foods or beverages packaged in these containers. For more information go to: www.P65Warnings.ca.gov/BPA.

Proposed Section 25603.3(g)(2).

Both the emergency and non-emergency regulations also include an opportunity to cure violations of this new warning regime. This is surprising since Proposition 65 does not provide any right to cure violations of the law.³ However, apparently at the behest of the retail industry, the proposed regulation includes the following provision:

³ In 2013, the Legislature passed AB227, which bars private enforcement actions under Proposition 65 relating to four particular exposure scenarios where the alleged violator both

(A) Where a retail seller complies with all the provisions of subsections (f) and (g), an opportunity to cure exists to correct the absence of the warning sign, which:

- (i) Is not the result of intentional neglect or disregard for the requirements of this section; and
- (ii) Is not avoidable using normal and customary quality control or maintenance, and
- (iii) Is corrected within 24 hours of discovery or notification.

Proposed Section 25603.3(f)(2)(A).

II. DISCUSSION

A. The Proposed Regulation Conflicts With Proposition 65.

While OEHHA has been designated by the Governor as the “Lead Agency” with authority to adopt regulations under Proposition 65, the agency has no authority to promulgate regulations that contradict the statute:

Whenever by the express or implied terms of any statute a state agency has authority to adopt regulations to implement, interpret, make specific or otherwise carry out the provisions of the statute, no regulation adopted is valid or effective unless consistent and not in conflict with the statute and reasonably necessary to effectuate the purpose of the statute.

Gov’t Code § 11342.2. A proposed regulation must be “in harmony with, and not in conflict with or contradictory to, existing statutes, court decisions, or other provisions of law. *Id.* §§11349(d) and 11349.1(a)(4). Indeed, as OEHHA acknowledges, the agency “cannot exempt whole business sectors from complying with the law, which requires warnings to be provided when the business exposes a consumer to a listed chemical from a product at significant levels.” ISOR, p. 16. However, by permitting vague warnings that are intentionally crafted to ensure that consumers do not exercise their right to choose to avoid being exposed to toxic chemicals, and

cures the violation and pays a specified penalty within 14 days of receiving a pre-suit notice. *See* Health & Safety Code § 25249.7(k). This limited opportunity to cure differs from OEHHA’s current proposal because: (1) public prosecutors can still pursue Proposition 65 violations that are not subject to private enforcement (*id.*, § 25249.7(n)); (2) to escape private enforcement, alleged violators must not only cure the violation but also must pay a penalty (*id.*, § 25249.7(k)(2)(B)); and (3) a company may only avail itself of AB227’s cure provisions once (*id.*, § 25249.7(m)). Most importantly, AB227 was passed by the Legislature, which has the authority to amend Proposition 65 with a two-thirds vote, and not by OEHHA, which does not.

by purporting to give an unlimited “Get Out Of Jail Free” card to retail sellers who violate the law, the proposed regulation contradicts Proposition 65 and essentially exempts whole business sectors (suppliers and sellers of the Products) from Proposition 65.

1. Vague And Confusing Signs At Cash Registers Do Not Provide A Clear And Reasonable Warning As Required By Proposition 65.

Proposition 65 generally requires a clear and reasonable warning before consumers are exposed to a listed chemical. Health & Safety Code § 25249.6. The whole purpose of the statute’s warning requirement is to provide consumers with meaningful information to enable them to choose whether to be exposed to known carcinogens and reproductive toxicants. This purpose is not satisfied by the warning language or method endorsed by the proposed regulation.

a. The Proposed Warning Language Is Not Clear And Reasonable Since It Does Not Enable Consumers To Determine Which Products Are Subject To The Warning.

First, the language of the proposed warning is not clear and reasonable since it does not enable consumers to distinguish the Products to which the warning applies (*i.e.*, those that will expose the consumer and his or her family to BPA) and those to which the warning does not apply. Instead, the proposed warning language includes a statement that “[*m*]any food and beverage cans have linings containing bisphenol A (BPA),” and that “[*j*]ar lids and bottle caps *may* also contain BPA.” Proposed Section 25603.3(g)(2) (emphases added). The underscored language (“many” and “may”) leaves consumers to wonder which food and beverage cans and which jar lids and bottle caps to avoid if they wish to avoid an exposure to BPA. Should consumers avoid all of the Products or just some? All products in jars with lids or bottles with caps or just some?

Requiring product-specific warnings is key to ensuring that Proposition 65’s purpose is achieved. As OEHHA explained in the previous emergency rulemaking proceeding, Proposition 65 “is designed to help consumers decide whether to assume the risks of *purchasing particular products* that result in exposures to listed chemicals.” Amended Notice of Emergency Action, April 2, 2016, p. 2 (emphasis added). For this reason, both OEHHA’s existing and proposed new safe harbor regulations require that consumer product warnings be provided using language that enables consumers to distinguish which products are subject to the warning and which are not. *See* 27 Cal. Code Regs. § 25603.2(a)(2) (“WARNING: *This product* contains a chemical known to the State of California to cause reproductive toxicity.”); Proposed Section 25607.2(a)(3) (“WARNING: Consuming *this product* can expose you to . . .”). The vague statements provided for in the proposed warning language are a far cry from the product-specific warnings required by OEHHA’s existing and proposed safe harbor regulations.



Courts have also recognized that vague consumer product warnings that do not enable consumers to distinguish which products are at issue do not satisfy Proposition 65. Indeed, “[c]ase law has discussed the importance of designing warnings to identify the specific consumer product that is the subject of the warning.” *American Meat Institute v. Leeman* (2009) 180 Cal.App.4th 728, 761. As the court in *Leeman* elaborated:

In short, to comply with Proposition 65, point of sale warnings must be designed to effectively communicate to consumers that the specific product targeted by the warning is a carcinogen or a reproductive toxin.

Ibid. OEHHA’s proposed point of sale warning sign directly conflicts with this directive from the *Leeman* court by failing to communicate to consumers which specific products are targeted by the warning.

CEH acknowledges that the proposed regulation, unlike the existing emergency regulation, does require that upstream suppliers provide a list of BPA-containing Products to OEHHA. Proposed Section 25603.3(f)(A)(2)(a). OEHHA apparently intends to post this information on its website, although nothing obligates the agency to do so. CEH appreciates that posting information about specific products that require a warning is an improvement from the current situation in which consumers have absolutely no way of discerning which Products to avoid. However, OEHHA’s use of its new Proposition 65 website to provide a key component of any Proposition 65 product warning -- identifying the products to which the warning applies -- also contradicts the regulations establishing the new website. As those regulations recognize, providing information to OEHHA for posting on its website “shall not be deemed to constitute compliance with the requirement to provide a ‘clear and reasonable’ warning pursuant to Section 25249.6 of the Act” 27 Cal. Code Regs. § 25205(g). And, as OEHHA explained in the Initial Statement of Reasons issued in connection with that provision:

. . . providing information to OEHHA for the website does not constitute a clear and reasonable warning under the Act. This section is not to be interpreted in such a way that a business may rely exclusively on any website (whether OEHHA’s or otherwise), or other device to attempt to provide a warning where the consumer must seek out the mandatory minimum information required in Section 25249.5 [sic] of the Act. For example . . . ***an invitation to determine which products within a retail facility require a warning via a website would not comply with the Act.***

ISOR, Section 25205(d), pp. 9-10 (issued January 16, 2015) (*citing Ingredient Communication Council, Inc. (“ICC”) v. Lungren* (1992) 2 Cal.App.4th 1480). As the Court held in the *ICC* case cited by OEHHA, “[a]n invitation to inquire about possible warnings on products is not equivalent to providing the consumer a warning ***about a specific product.***” *ICC, supra*, 2



Cal.App.4th at 1494 (emphasis added). CEH is baffled and disappointed that OEHHA is ignoring its own guidance and disregarding the *ICC* court’s ruling by proposing to post a list of the Products to which the BPA warning applies on its website.⁴

A cross-reference to OEHHA’s website for a list of Products subject to the warning is far inferior to using that information to provide product-specific warnings in stores because: (1) busy consumers are unlikely to have the time to cross-reference the contents of their grocery carts with OEHHA’s website, particularly during the checkout process; and (2) due to the digital divide, many consumers -- and particularly low income consumers from already vulnerable communities -- do not have access to smart phones or other technology required to access the information.⁵

Indeed, OEHHA agrees that product-specific warnings on store shelves would be superior to what the agency is now proposing:

It is anticipated that, going forward, manufacturers will reduce or eliminate exposures to BPA from canned and bottled foods, so fewer products will require warnings over time and *it will be easier for consumers to differentiate products that cause exposures to BPA since warnings will eventually be provided on the product labels or near the products on shelf tags or signs.*

ISOR, p. 11 (emphasis added).

Moreover, the fact that this specific information can and presumably will be provided to OEHHA also underscores the fact that the same information could and should be used to provide product-specific information to consumers while they are deciding which products to purchase. See ISOR, p. 15 (“It has been over one year since the listing of BPA, which should be sufficient

⁴ It is also troubling that, by purporting to voluntarily undertake a portion of the suppliers’ Proposition 65 warning obligation, OEHHA is effectively shifting the costs of compliance from the companies responsible for exposing consumers to BPA to consumers through the public fisc. And, what happens if OEHHA fails to post the list of Products, or to keep that list up-to-date, due to budget constraints or some other reason?

⁵ See ISOR, p. 10 (“Those consumers with smart phones will be able to access the information while at the store, while others may be able to access the information via their computer at home.”). While true, this statement implicitly acknowledges that: (1) consumers without smartphones will *not* be able to access the information at the store; and (2) some consumers will be unable to access the information altogether. Indeed, while the so-called “digital divide” may be narrowing, many consumers still lack access to smartphones or the internet. For instance, according to the Pew Research Center, one-third of U.S. adults and 70 percent of people aged 65 and older do not own a smart phone. See “Jitterbug phones give seniors a Lyft,” San Francisco Chronicle, Aug. 30, 2016, p. D1.



time for businesses to determine which canned and bottled food products cause exposures to BPA.”). OEHHA’s decision to exempt companies from providing product-specific warnings in stores is particularly inexcusable where OEHHA acknowledges that the information and means to provide those warnings to consumers while making their purchasing decisions is available.

b. The Proposed Warning Method Is Not Clear And Reasonable.

The method of providing the warnings to consumers under the proposed regulation -- 5 inch square cash register warning signs -- is not clear and reasonable. OEHHA’s safe harbor warning regulations require that any warning be provided by a method that is “reasonably calculated, considering the alternative methods available under the circumstances, to make the warning message available to the individual prior to exposure.” 27 Cal. Code Regs. § 25601. OEHHA’s new proposed safe harbor warning regulations delineate several specific methods for providing consumer product warnings, none of which include vague signs at cash registers. *See* Proposed 27 Cal. Code Regs. § 25602(a). The proposed warning sign -- which will be placed near cash registers where consumers are by definition distracted by checkout displays and generally prioritizing leaving the store after having already made their purchasing decisions -- does not satisfy either the existing or the proposed safe harbor regulations.

The proposed regulation also runs afoul of the requirement in OEHHA’s existing warning regulations that any warning be displayed in a manner such “as to render it likely to be read and understood by an ordinary individual under customary conditions of purchase or use.” 27 Cal. Code Regs. § 25603.1(c). The proposed warning scheme whereby small signs will be placed at busy checkout stations appears to be intentionally crafted in a way that it will be neither read nor understood, and certainly not heeded, by an ordinary individual.

2. The Retailer Cure Provision Does Not Comport With Proposition 65.

The regulation’s cure provision for retail sellers is also inconsistent with Proposition 65, which prohibits knowing and intentional exposures to listed chemicals without a warning, authorizes penalties and injunctive relief for violations of the statute, and does not include any opportunity to cure. The cure provision will remove any incentive for retail sellers to comply with the law since they will be comfortable in the knowledge that they can always cure any violations that are brought to their attention and then argue that they are immune from any liability.

This aspect of the proposed regulation is also inconsistent with Health and Safety Code section 25249.7, which provides for penalties and injunctive relief against any person who violates Proposition 65’s warning requirement. It does not include any provision for cure. Thus, OEHHA lacks authority to promulgate it.

B. There Is No Valid Justification For Relaxing Proposition 65’s Warning Requirement For BPA In Canned And Bottled Foods and Beverages.

1. OEHHA’s “Consumer Confusion” Justification Is Invalid.

OEHHA seeks to justify the proposed regulation on the grounds that consumers could be confused by potentially inconsistent warning messages on BPA-containing Products. ISOR, p. 11. In particular, OEHHA claims that, absent the regulation, some businesses may elect to provide different warning messages regarding exposures to BPA from the Products, and some may perform exposure assessments and determine that no warning is required at all. *Id.*, pp. 5-6 and 11. In other words, OEHHA is apparently concerned that, absent this regulation, companies may actually comply with Proposition 65 as the voters intended by: (1) removing a known reproductive toxicant from their products or reducing its presence to non-actionable levels; or (2) providing a clear and reasonable warning that allows consumers to make informed choices about whether to expose themselves to toxic chemicals. However, Proposition 65 working the way it was intended to work by providing product-specific warnings when warranted does not justify a departure from the statute’s clear and reasonable warning requirement.

In fact, the same circumstances that OEHHA identifies as justifying its actions here exist for every single chemical and potential product exposure subject to Proposition 65. In particular, for every product, businesses that are knowingly and intentionally exposing consumers to listed chemicals must determine whether to provide a clear and reasonable warning or whether the business will be able to demonstrate that the exposure is below the level requiring a warning. While OEHHA admits that its purported justification of potential consumer confusion is “always” a “risk when a new chemical is added to the list,” the agency seeks to distinguish the present situation on the ground that there are a lot of canned and bottled food and beverage products that contain BPA. ISOR, p. 6. However, the fact that there is a high potential for consumers to be exposed to BPA through the food and beverages they consume counsels in favor of product-specific warnings, not the generic point of sale signs OEHHA is proposing.⁶

⁶ OEHHA also seeks to justify the regulation on the ground that OEHHA has not yet established a regulatory safe harbor level, or “Maximum Allowable Dose Level (MADL)” for BPA. ISOR, p. 4. However, of the over 300 chemicals that are listed as reproductive toxicants under Proposition 65, OEHHA has only established MADLs for approximately 2 dozen chemicals. *Cf.* 27 Cal. Code Regs. §§ 27001, subd. (c) and 25805, subd. (b). Thus, this purported justification also applies to the vast majority of Proposition 65 chemicals. It is also worth noting that: (1) the statute does not even contemplate the establishment of regulatory safe harbor levels, instead placing the burden on businesses to prove that the exposure will have no observable effect assuming exposure at one thousand (1,000) times the level in question;” (Health & Safety Code

OEHHA’s purported justification is also based on a series of speculative and flawed assumptions that are completely unsupported by any data. For instance, while OEHHA expresses unfounded concern about the potential for inconsistent warning messages, OEHHA admits that, absent the regulation, most businesses will simply comply with OEHHA’s existing safe harbor warning regulation by warning that the food or beverage product “contains a chemical known to the State of California to cause birth defects or other reproductive harm.” ISOR, p. 6. Again, companies complying with the law is not a justification for weakening that law.

Ultimately, OEHHA is apparently dissatisfied with its existing safe harbor warning because it does not require businesses to name the specific chemical at issue or provide any further information about BPA. ISOR, p. 6. If OEHHA does not like its existing safe harbor warning regulations, it can and should amend them; in fact, OEHHA has spent the past several years in an ordinary rulemaking process that is nearing completion to do just that. However, having failed to complete that process, OEHHA should not deviate from its existing safe harbor warning regulations as to one particular chemical in a subset of products.

2. OEHHA’s “Industry Burden” Justification Is Invalid.

OEHHA is also apparently trying to justify the proposed regulation on the ground that it will reduce the burden for industry to comply with Proposition 65: “[p]roviding notice and signage to the retailer should be considerably less burdensome than recalling and individually labeling cans that are already in the supply chain.” ISOR, p. 15. While this may be true, OEHHA’s desire to reduce industry’s burden in complying with the law does not justify the agency’s attempt to weaken the law.

OEHHA cites to the following provision in Proposition 65 to justify its attempt to reduce industry burden:

‘[i]n order to minimize the burden on retail sellers of consumer products including foods, regulations implementing section 25249.6 shall to the extent practicable, place the obligation to provide any warning materials such as labels on the producer or packager rather than the retail seller...’

ISOR, p. 7 (*quoting* Health & Safety Code § 25249.11(f)). This provision supports imposing an obligation on upstream companies to label the Products individually or to provide compliant Proposition 65 shelf signs or warning tags for the Products. It does not, however, support

§ 25249.10(c)); and (2) even with a MADL in place, businesses must conduct exposure assessments to determine whether their products result in an exposure above the MADL.



OEHHA's approach of imposing an obligation on upstream suppliers to provide generic point-of-sale warning signs that do not comply with Proposition 65's clear and reasonable warning requirement.

Ultimately, OEHHA's true purpose here is to protect companies from potential Proposition 65 liability for exposing consumers to BPA in the Products without a clear and reasonable warning. OEHHA's action in this regard is particularly egregious since companies have already been provided with the 12 months that voters determined was the appropriate amount of time to bring themselves into compliance with Proposition 65's warning requirement with respect to BPA exposures. Because a state agency's desire to protect industry from legal liability for violating state law does not justify weakening that law, OEHHA should not proceed with the proposed regulation.

C. The Proposed Regulation Does Not Even Address The Purported Justification.

The flaw in OEHHA's analysis is underscored when one considers that the regulation as drafted does not even address the justification identified by OEHHA. In particular, OEHHA claims that the regulation will help avoid consumer confusion and provide "consistent, informative, and meaningful warnings to consumers about significant exposures to BPA." ISOR, p. 3. However, there is no evidence that signs at cash registers using OEHHA's proposed generic and confusing language will in any way provide a clearer message to consumers than a straightforward warning label on or near the products. To the contrary, to the extent they are even read by consumers, the proposed signs are likely to generate more confusion.

Also, the proposed regulation allows manufacturers, producers, packagers, importers and distributors of the Products to affix a label to such products bearing any warning that satisfies Proposition 65's clear and reasonable warning requirement. Proposed Section 25603.3(f)(1)(A). Thus, while the proposed regulations provide the option of posting point-of-sale signs with meaningless information about possible BPA exposures, companies will still retain the option of providing more meaningful warning messages on the product themselves. CEH strongly disagree with OEHHA's contention that product-specific warnings authorized by OEHHA's current safe harbor regulations will lead to consumer confusion. However, the important point for present purposes is that the proposed regulation does not even further the purported justification since companies will still retain the option of providing the very warnings that OEHHA itself developed but is now attacking.

OEHHA also fails to articulate how the potential consumer confusion the agency is purporting to address will be alleviated by the opportunity to cure that the regulation offers to retail sellers. To the contrary, this provision is completely unrelated to the justification that OEHHA provides.



III. CONCLUSION

Under the proposed regulation, OEHHA would be effectively endorsing the use of vague warnings that do not distinguish for consumers which products will expose them to BPA and which do not. This deviation from the clear and reasonable warning requirement of Proposition 65 is particularly unnecessary since companies should be able to easily identify which Products contain BPA. The chemical is an intentionally added ingredient to the cans and bottles at issue, and food and beverage companies should easily be able to identify their BPA-containing products by lot number. Indeed, the regulation itself requires that this information be provided to both retail sellers of the Products and to OEHHA for posting on its website. Proposed Section 25603.3(f)(1)(B)(ii). There is no reason this same information should not be provided to consumers while they are actually shopping so they can make the informed choice to which they are entitled under Proposition 65.

Worse yet, promulgating this regulation will completely undermine OEHHA's longstanding efforts to make Proposition 65 warnings more meaningful. If the agency formalizes its position that a vague and watered down statement like the one proposed here is clear and reasonable, any company can use similar language for other consumer product exposures and rely upon OEHHA's finding here. The agency apparently anticipates and tries to avoid this problem by stating that this situation is "unique" due to the longevity of the Products and the volume of Products at issue. ISOR, pp. 5 and 10. However, since OEHHA elsewhere admits that its purported justifications essentially apply to all chemicals in all products (at least newly listed chemicals) (*id.*, p. 6), this conclusory language is unlikely to prevent companies from trying to rely on this regulation in other situations.

By endorsing the use of vague and meaningless warnings, and by purporting to provide retail sellers with an opportunity to cure violations of the law, the regulations undermine Proposition 65's fundamental purpose of providing consumers with the right to know before they are exposed to known reproductive toxicants like BPA. OEHHA's proposed regulation takes a paternalistic approach that shields California consumers from information to which they are legally entitled. OEHHA should not proceed with this regulation.

Sincerely,

Caroline Cox
Research Director
Center for Environmental Health