



April 26, 2016

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

Sent Via e-mail to” [P65PublicComments@oehha.ca.gov](mailto:P65PublicComments@oehha.ca.gov)

**Re: Proposed Repeal of Article 6 and Adoption of New Article 6 – Clear and Reasonable Warnings**

Dear Ms. Vela:

Thank you for the opportunity to submit additional comments regarding the Office of Environmental Health Hazard Assessment’s (OEHHA’s) Proposed Repeal and re-enactment of Article 6, Sections 25601 through 25605.2 in Title 27 of the California Code of Regulations (CCR) pursuant to the Safe Drinking Water and Toxic Enforcement Act (Prop 65). As you may be aware, our organization has signed a coalition letter, dated April 26, 2016, submitted by the California Chamber of Commerce and other organizations and businesses. We support and are committed to the comments contained in that letter. However there are additional issues unique to grocery retailers that were not addressed in the revisions released on March 25, 2016. In this letter, we raise those issues independently of the larger coalition.

The California Grocers Association (CGA) is a non-profit, statewide trade association representing the food industry since 1898. CGA represents approximately 500 retail members operating over 6,000 food stores in California and Nevada, and approximately 300 grocery supplier companies. Traditional supermarkets in California employ more than 300,000 residents in virtually every community in the State.

CGA’s retail grocers are uniquely situated in the Prop 65 debate in that we do not generally manufacture the products sold in our retail stores, nor do we determine the chemical make-up of products we sell. Rather, we work with manufacturers to make their products available to the public. We believe this unique position was acknowledged in Prop 65 itself with Health and Safety Code (HSC) Section 25249.11(f)’s requirement that OEHHA minimize the burden on retail sellers when it adopts regulations relating to clear and reasonable warnings. We would urge that mandate be upheld in this process.

In addition, we would caution strongly that OEHHA give great deference to its own comments during the process to promulgate emergency regulations relating to BPA food warnings. During that process, OEHHA correctly noted that, “Placing point-of-display signs throughout a facility at each location where an affected product is displayed would be unworkable given the number of products affected.” That was correct with the number of products expected to be covered by BPA warnings and is an even more appropriate statement when multiplied across thousands, if not tens of thousands, of additional products that, under the proposed regulations, would require individual point-of-display warnings.

It is critical to note that in the restaurant setting, consumers receive warning information that is similar to that determined to be more workable for BPA in the short term. Rather than mandating restaurants become littered with individual food product warnings, generalized signage has long been the preference and requirement, with additional information available should a consumer wish to obtain it. There is no rational basis to treat the grocery setting differently than the restaurant setting and in fact the proposed regulations provide numerous instances outside the food setting where generalized warnings are deemed appropriate.

Additional comments regarding a few specific proposed sections appear below.

**Proposed Section 25600.2** This section is fundamentally flawed in several ways. It directly contradicts HSC 25249.11(f) by shifting the actual and legal burden for providing consumer warnings from product manufacturers to retailers. Pursuant to (b), a manufacturer could simply include a notice letter and shelf tags/flyers/stickers containing a specific warning label in a product shipment and thereby absolve itself of any additional responsibility. It would then be up to the retail entity to effectuate and maintain consumer warnings – and the retail entity would bear all liability if that were not done or done improperly. This deficiency persists throughout the subsequent proposed regulation on warnings.

Beyond the overall shift of the actual and legal burden to notify, the specific language of the proposed regulation is deficient in several ways. Proposed 25600.2(b)(3) is significantly problematic in that it not only allows a manufacturer to shift all responsibility and liability for providing warnings to a retailer, but it allows them to dictate the manner in which the warning is provided regardless of specific retail needs. The proposed regulation allows for manufacturers to impose upon retailers, “...warning materials such as labels, labeling, shelf signs or tags...” without regard for which option or options may or may not work at a specific retail location. Retailers are denied all opportunity to dictate display, arrangement, and consumer interaction inside their own stores.

This deficiency is magnified when you consider that, unlike existing emergency regulations governing BPA that allow for placement of a single general warning in the food retail setting, these proposed regulations contemplate individual product warnings littering store aisles. Keeping up with one standardized sign at all point of sale areas is one thing, but attempting to post and maintain possibly thousands of individual product shelf tags, signs, or other labels is an impossible task and necessarily will lead to an explosion of litigation against retailers. Litigation involving products they themselves do not manufacture or control ingredients of.

In some cases, the proposed regulation specifically places the entire burden for compliance, even determining which products require warnings and crafting those warnings, on the retailer and absolves entirely the product manufacturer. Proposed 25600.2(e)(1) creates new obligations for retailers if a product is manufactured by a third party yet packaged under a retailer’s own label or mark. In many instances, even though a product may bear the “brand name” of a given retail company, it is actually manufactured by a third party.

We would suggest that OEHHA revise the proposal to, at a minimum, address the inappropriate violations of HSC 25249.11(f) and other specific deficiencies. That could include provisions that allow a shifting of actual and legal burden for warnings to the retailer only if that retailer consents in writing to take responsibility for posting and maintenance of required warnings, and the format of the warning (shelf tag, on package, signage, etc...).

Should the Department wish to continue down the course of allowing manufacturers to unilaterally choose to shift all actual and legal warning burden to retailers, and determine how retailers interact with consumers using those warnings, at a minimum the regulation should include:

- A requirement that the manufacturer provide retailers with 30 days' notice that it intends to provide information regarding a required Prop 65 warning for a given product;
- A provision allowing retail entities at least 30 days to make any adjustments to display areas, shelf tag configurations, product displays, etc... to accommodate warnings once received from a manufacturer;
- A provision allowing retail entities to sell through existing product when new warnings are required or new warning methods employed; and
- A provision allowing retail entities a 14-day opportunity to cure any violations associated with maintenance of required warnings once received from the manufacturer and installed at the retail setting.

**25607.2 Food Exposure Warnings – Methods of Transmission:** Substantial concerns exist across all warning categories, including those for food products. Additional challenges are presented for food products if manufacturers force retailers to utilize shelf tags given the information currently required for shelf tags and the fact that in some instances multiple shelf tags are already in use for individual products. For example, separate shelf tags are required to identify items authorized for purchase under California's Special Supplemental Food Program for Women, Infants, and Children (WIC) program and those tags have specific requirements. Pricing and product quantity information must be present. In addition, some companies voluntarily include additional shelf labels to identify product that are gluten-free or diabetic-friendly or lower-sodium. For a product that may already have more than one shelf tag, which prevails in determining the largest font size? Where should the various tags be placed?

In addition, there is no clarity as to what "...any consumer information about a specific food product..." means in terms of warning translation requirements. Presence of one word in a language other than English on packaging or promotional signage could trigger a translation requirement – or litigation if no translation appears. If a product is promoted in association with a religious or ethnic holiday would that mean all warnings must be translated? For example, would signage noting certain foods are available for Hanukkah celebrations trigger a requirement that warnings be translated into Hebrew? Would signage noting specials on products commonly promoted for Cinco de Mayo trigger a requirement for translation of warnings into Spanish?

The sheer volume of signage contemplated by the proposed regulations is staggering when extrapolated to the thousands of individual labels that will be necessary across a store's offerings. It is impossible to imagine all those individual warning signs appearing multiple times in a variety of languages.

**25607.5 Food and Non-Alcoholic Beverage Exposure Warnings for Restaurants – Methods of Transmission and 25607.6 Food and Non-Alcoholic Beverage Exposure Warnings for Restaurants - Content:** This proposed section represents one of the most egregious examples seen of disparate treatment for identical food products based solely on business model. Food offered for sale in restaurants is substantially similar to that offered in the grocery store setting. The main difference is that consumers generally purchase items for future consumption at the grocery store while they consume most restaurant purchases immediately. There is no logical rationale to provide a different warning scheme for potato chips, coffee, breakfast cereals, dried seaweed, cocoa, or any other food product simply because it

April 26, 2016  
Ms. Monet Vela  
Page 4 of 4

is sold in a restaurant versus a grocery store. And yet the proposed regulation seeks to reiterate and solidify the disparate treatment based not on the fundamental requirement for a warning or knowledge on the part of the retailer, but rather based on business model alone.

Under the proposal, restaurants would be required to post specified signage at all public entrances or at each point of sale alerting customers to the fact that some food sold or served could expose consumers to specified chemicals. The signage requirement includes referral to the OEHHA-maintained web site. There is no identified reason for food in the restaurant setting to be treated differently than food in the grocery retail setting. We strenuously object to holding different food vendors to different standards and requirements despite in some cases identical food products. In fact the warning method and content the proposed regulation seeks for restaurants is equally appropriate and valid in the grocery retail setting and we would request that it be applied equally to all types of food vendors, not just restaurants.

Again, thank you for the opportunity to submit comments both with the Cal Chamber coalition and as an independent representative of food retailers. We look forward to continuing a dialogue on this proposal and identifying solutions that will allow consumers to gain additional, desired information without cluttering grocery store aisles and shelves in a way that could push consumers away from healthy, wholesome foods.

Sincerely,

A handwritten signature in black ink that reads "Keri Askew Bailey". The signature is fluid and cursive, with the first letters of each name being capitalized and prominent.

Keri Askew Bailey  
Senior Vice President, Government Relations & Public Policy