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April 25, 2016

Monet Vela  
Office of Environmental Health Hazard Assessment  
P. O. Box 4010  
1001 I Street  
Sacramento, CA 95812-4010

***Sent Electronically to:*** [P65Public.comments@oehha.ca.gov](mailto: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**) appreciate the opportunity to submit comments regarding the Office of Environmental Health Hazard Assessment's (**OEHHA**) current rulemaking pertaining to Title 27, California Code of Regulations (**CCR**), Article 6, governing "Clear and Reasonable Warning" pursuant to the Safe Drinking Water and Toxic Enforcement Act of 1986, as amended (**Prop. 65**). More specifically, these comments pertain to OEHHA's March 25, 2016, modified proposed regulation pertaining to the adoption of a new Article 6 – "Proposition 65 Clear and Reasonable Warnings" – in Title 27, California Code of Regulations (**Proposed Regulations**).

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, ski resorts, guest ranches, agricultural "homestays," tourist homes, condominiums, timeshares, vacation home rentals, and extended stay establishments, among other transient lodging establishments.

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414 29TH STREET  
SACRAMENTO, CA  
95816-3211  
916.444.5780  
[www.calodging.com](http://www.calodging.com)

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), mobile homes, and recreational vehicle parks.<sup>i</sup> Such facilities and establishments are, for most purposes, treated legally the same as traditional hotels and other types of transient lodging establishments.<sup>ii</sup>

For purposes of this letter, all transient lodging establishments in California, including but not limited to the types of operations identified in the two 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 5,547 hotels (508,214 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.
- Most 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.
- The vast majority of those are smaller operations: For example, 76% (4,216 properties) of the California hotels in STR's profile are under 100 rooms in size. Of these, 66% (2,783 properties) are under 75 rooms in size, and 50% (2,108 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 any particular hotel's operations, a safe rule of thumb is that a hotel with 20 rooms or more will have ten or more employees; however, smaller hotels in many situations will have ten or more employees as defined by Proposition 65.

The point here is that the vast majority of hotels impacted by OEHHA's proposed regulations are businesses with little-to-no expertise in Prop. 65 or the technical disciplines OEHHA assumes they have to comply with the warning requirements in the Proposed Regulations.

## **Specific CH&LA Comments**

### **1. Section 25600.1(a): "Affected Area"**

CH&LA submits that the definition of "affected area" is vague and potentially misleading. We understand that in the context of hotels, OEHHA's intent is that the affected area is the entire facility and not the limited zone(s) and space(s) within a facility where an exposure to a listed chemical might or does occur.

It is CH&LA's understanding that OEHHA is planning to address this problem in its Final Statement of Reasons. CH&LA does not think that dealing with this issue in that manner will be sufficient. It is rarely the case the individuals who use the Proposed Regulations will ever consider reviewing the Final Statement of Reasons, and they will therefore rely solely on the words in the actual regulation itself, without knowledge of important clarifications and statements of intent in the Final Statement of Reasons. In order to address this problem, the definition of "affected area" should be modified to make it clear and unambiguous.

CH&LA is also concerned about the use of the phrase "can occur" in Section 25600.1(a), because we think it is vague and unclear.

CH&LA therefore submits that the definition in Section 25600.1(a) be modified to read: "affected area" means the entire facility area in which an exposure to a listed chemical can or does occur at a level that requires a warning."

### **2. Sections 25600.1(d): "Consumer Product," and Section 25601(e) – "Consumer Product Exposure"**

CH&LA is very concerned about the definition of "consumer product" in that while hotels have a huge variety of items that fit that definition (e.g., furniture, power cords, soaps, shampoos, window treatments, flooring, cleaning supplies, and on and on), hotels have no knowledge of what chemicals may or may not be in such products. As proposed Section 25601(d) is currently drafted, hotel owners and operators will continue to be subject to 60-day notices of violation for consumer products present at their facilities.

CH&LA understands that it is OEHHA's intent that "articles and components" in and at hotels will not be considered to be consumer products, and, therefore, exposures from such items should not be the subject of warning notices. Again, however, the proposed regulatory definitions of these

important terms is not consistent with that intent, and it therefore allows more than sufficient room for plaintiffs to exploit these definitions to bring claims due to the presence of items in hotels.

In order to have the Proposed Regulations accurately reflect OEHHA's intent in this regard, CH&LA requests (1) that OEHHA put clarifying statements in the Final Statement of Reasons, and (2) that the following amendments to these definitions be made:

- Section 25600.1(d): "Consumer product" means any article, or component part thereof, including food, that is produced, distributed, or sold by a person generally engaged in consumer product sales for the personal use, consumption or enjoyment of a consumer.
- Section 25600.1(e): "Consumer product exposure" means an exposure that results from a person's acquisition, purchase, storage, consumption, or any reasonably foreseeable use of a consumer product, including consumption of a food.

**3. Recommended Sections 25607.xx and 25607.yy regarding safe harbor warnings for hotels.**

The most critical concern that CH&LA has with the Proposed Regulations is that there is no hotel-specific safe harbor warning mechanism. CH&LA submitted comments in the previous iteration of regarding the predecessor of the current rulemaking procedure, and it has otherwise communicated to OEHHA, that without a hotel-specific safe harbor mechanism, the safe harbor provisions in the Proposed Regulations present hurdles and barriers that virtually no hotel can overcome. Simply stated, it is impossible for hotels to comply with the safe harbor warning provisions as currently proposed.

CH&LA has urged for some time that it is imperative that there be a hotel-specific safe harbor warning procedure. For example, CH&LA's January 15, 2016 comments (which are hereby incorporated herein by reference) submitted with respect to the Proposed Regulations set forth a detailed explanation why the safe harbor warning procedures that hotels would be required to use make no sense, are impossible to implement from a practical standpoint, and would result in many hundreds of thousands of additional warning signs being hosted at each hotel, would be extremely expensive.

CH&LA submits that the only feasible approach is for OEHHA to treat 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.

To that end, CH&LA has submitted to OEHHA the following hotel-specific safe harbor warning provisions to insert in the Proposed Regulations:

**Section 25607.XX Hotel Exposure Warnings – Method of Transmission**

(a) For hotels, a warning meets the requirements of this article if it complies with the content requirements in Section 25607.xx and is provided as follows:

(1) The warning is provided on a sign posted at the primary public entrance to the facility in no smaller than XX-point type.

(2) The warning is placed so that it is readable and conspicuous to individuals as or before they enter the hotel building.

(3) Where there is open access to the facility with no designated public entrances, the sign shall be posted at the most common area used by the public to access the facility.

(b) "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 alcoholic beverages, food, and enclosed parking facilities where such exposures occur on the premises. Other specific warnings in this Subarticle 2 are not required.

NOTE: Authority cited: Section 25249.12, Health and Safety Code.  
Reference: Sections 25249.6 and 25249.11, Health and Safety Code.

## **Section 25607.XX Hotel Exposure Warnings – Content**

(a) A warning for hotel exposures meets the requirements of this article if it is provided using the method required in Section 25607.xx 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, "[Name of one or more exposure source(s)] in this hotel can expose you to chemicals such as [name of one or more chemicals] which is [are] 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](http://www.P65Warnings.ca.gov/hotels)."

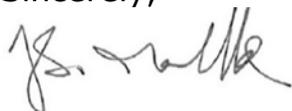
NOTE: Authority cited: Section 25249.12, Health and Safety Code.  
Reference: Sections 25249.6 and 25249.11, Health and Safety Code.

OEHHA has informed CH&LA that it agrees that hotels could have their own safe harbor warning language allowing for warnings at public entrances in the same general manner applicable to amusement parks. (Hotels would also have to meet the safe harbor warning requirements for alcoholic beverages (Sections 25603 and 25604), for food and non-alcoholic beverages (Sections 25605 and 25606), and for enclosed parking facilities (Sections 25607.20 and 25607.21)).

Unfortunately, OEHHA informed CH&LA that, from a procedural standpoint under the Administrative Procedures Act, it did not have sufficient time to insert hotel-specific safe harbor warning provisions into the Proposed Regulations and that it wishes to first finalize the Proposed Regulations, then hotel-specific warnings will thereafter be made part of the new Article 6 – "Proposition 65 Clear and Reasonable Warnings" – in Title 27, California Code of Regulations, and that this regulatory amendment will be accomplished well before the two-year delayed effective date of the Proposed Regulations (Section 25600(b)).

CH&LA looks forward to working with OHEEA as soon as possible to finalize the changes upon which we reached consensus. Please contact CH&LA when you are prepared to move forward with that process.

Sincerely,



Lynn S. Mohrfeld, CAE  
President & CEO

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<sup>i</sup> 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).

<sup>ii</sup> 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).