CLEAN WATER ACTION
CALIFORNIA

September 23, 2016

Acting Director Lauren Zeise
Office of Environmental Health Hazard Assessment
1001 I Street
Sacramento, CA 95814

Re: Readoption of Emergency Action to Amend Section 25603.3 Title 27, California Code of Regulations - Warnings for Exposures to Bisphenol A from Canned and Bottled Foods and Beverages

Dear Acting Director Zeise,

Thank you for this opportunity to provide Clean Water Action's comments on the Office of Environmental Health Hazard Assessment's (OEHHA) proposed regulation regarding BPA in canned food and beverages on behalf of our 30,000 California members.

The current "emergency regulations" have failed utterly in allowing our members, and the California public in general, to make choices to protect themselves from exposure to BPA or to drive some manufacturers to move away from the chemical in a timely fashion. Any extension of regulations that allow non-product specific warnings will serve to further the risk to consumers by obstructing their right to know which products contain BPA. Instead, it puts OEHHA in the position of neglecting its responsibility to implement the Proposition 65 (Prop 65) requirements for the benefit of the public. For these reasons, we oppose the proposed regulation and urge the agency to require product specific warnings either on products or in a place in the store that is visible before purchase decisions are made (i.e., in the aisle).

While our position is primarily based on public safety and right to know, if adopted, OEHHA's proposed regulation could actually undermine Prop 65 in future. The regulation would establish a precedent of giving a specific product type a *pass* on informing the public in a useful manner of possible exposure to a reproductive toxicant. Furthermore, vague and ineffective warnings contribute to on-going criticisms of the statute itself, weakening the public perception of the law and Californians' faith in the agencies responsible for regulations.

If the use of BPA in canned food and beverages does warrant a special rule, it would be to accelerate product specific warnings given the very nature of the products involved. Food and beverages are necessities for all people, meaning that exposure is almost universal and tied to a daily action of actual survival. In addition, the lack of product specific warnings puts low income families and communities of color at particular risk given a lack of access to fresh foods and a greater dependency on canned items.[1]

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No Need for Delay

The business sector is one of the most creative and resilient parts of society and the canned food industry is no exception. Since the early 20th Century, manufacturers have had to respond to new labeling requirements regarding ingredients, nutritional information, and allergens. In the case of Prop 65, these same manufacturers have had sufficient time to provide product-specific warnings or transition from toxic BPA epoxy linings in their products. In addition, they have the ability to establish strict requirements from their packaging suppliers to comply with safer, BPA-free products.

By the end of the emergency regulation period in October 2016, companies will have had 18 months to transition away from BPA or adopt clear and reasonable warnings as required under Prop 65. It is important to note that this is six months longer than any other industry has been given since Prop 65 was enacted by California voters. This has served to reward companies that continue to use this toxic chemical in their canned food linings at the expense of more innovative leaders such as Eden Foods, and to allow them to hide their use of a Prop 65 chemical behind generic warnings.

There is a Choice

Research has shown that Americans' confidence in the safety of the U.S. food supply has been eroding, from 78% in 2012 to 61% in 2015. Forty six percent (46%) of those expressing a lack of confidence rate chemicals in food as their chief concern, overtaking fear of food borne illnesses.[2] Consequently, consumers want information that allows them to avoid toxic chemicals and increase their comfort about what they are eating.

The existence of BPA free cans means that many consumers can choose not to expose themselves through their purchasing decisions. However, even when retailers conspicuously post generic warnings at the checkout – something that has not been reliable to date --the proposed warnings fail to provide consumers with the information they need when they are making shopping decisions and do not make it clear which products contain BPA and which do not. This robs consumers of an informed choice and they must either avoid canned foods and beverages all together or guess and take their chances with an avoidable exposure. This scenario is in opposition to OEHHA's newly adopted general regulations, which provide for safe harbor warnings that are product specific. It also puts people who do not have the option of avoiding canned products at greater risk.

Warnings Must be in Multiple Languages

The statute requires companies to provide consumers with a "clear and reasonable" warning when products expose consumers to chemicals known to cause cancer or reproductive harm. It does not differentiate consumers by language proficiency, cultural background, or economic status. Given the universal consumption of canned food and beverages, albeit in varying degrees, it is especially important that any Proposition 65 warning for BPA in canned food be provided in the languages spoken by California's diverse communities. Without a good faith effort to communicate Prop 65 warnings to a wide sector of the public, OEHHA's proposal undermines CalEPA's commitment to Environmental Justice. California Government Code Section 65040.12 section defines environmental justice as "the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income, with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies".

A Social Justice Issue

As already stated, low income communities and communities of color are often more dependent on canned and other packaged food. Consequently, the proposed amendment to Prop 65 with its generic warning will result in a disproportionate burden of harm to those most vulnerable to exposure to BPA. For instance, participants in the Supplemental Nutrition Assistance Program (SNAP) consume canned food more frequently than others. Over 30% of all fruit consumed in SNAP and Women, Infants, Children program (WIC) households is canned, as compared to 25% of other households.[3] Arguments that product specific warnings may discourage low-income families from purchasing canned foods altogether are paternalistic and ill conceived. Such a position not only takes away the right of low-income consumers to make informed decisions to reduce exposures, the lack of product specific warnings may in fact be a reason for disadvantaged communities to avoid purchasing nutritious foods in BPA free cans, since they can't identify them on the shelf. Consequently, non-product specific warnings are a social injustice and could lead to even greater access to quality foods in some communities.

Website Information is Inadequate.

The internet offers many advantages to share information within society. However, putting information about which canned food products contain BPA and which do not on a website instead of on the products or retailer shelves is ineffective. Few consumers have the time or inclination to do an internet search during the shopping experience. In addition, many consumers still do not have smart phones with Internet access. This is particularly true for those who cannot afford expensive phone/Internet plans, thus exacerbating a situation whereupon they are already at risk of higher than average exposure. Differences in culture, age, and other factors also expand the "digital divide" among consumers.

Even without these equity considerations, it is the responsibility of a product manufacturer to warn consumers about the potential of exposure to a Prop 65 chemical, and not the responsibility of the consumer to track that information down. Consequently, any information provided online should be in addition to, not in place of product specific warnings. If OEHHA develops a database of food and beverage products that contain BPA as an additional means of information, we recommend that the website have requirements for strict accuracy and be consistently updated.

BPA is the Tip of the Iceberg

Clean Water Action's report *What's in the Package: Unveiling the Toxic Secrets of Food and Beverage Packaging*[4] cites multiple studies that demonstrate that of the thousands of food packaging chemicals, unknown numbers are linked to serious human health problems and environmental harm. Nor is BPA the only food packaging chemical on the Prop 65 list.[5] The reason the actual number of toxic chemicals is unknown, however is because their use is usually hidden from both government and consumers, many chemicals are not fully studied, and the data gap is interpreted as meaning they are safe. As we learn more about the 3,000 to 6,000 chemicals in current use, particularly at low dose exposures, it can be expected that Prop 65 will be an important conduit for warning and thus protecting the public from packaged food related exposures. Consequently, in addition to establishing a damaging precedent in terms of the law itself, the proposed regulation creates a situation by which consumers should feel less secure about their ability to make the best personal choices about their nutrition in future.

Clean Water Action's members want two interrelated things: 1) to know what they are buying and 2) for companies to move away from toxic chemicals and replace them with safer alternatives. OEHHA has

the responsibility to implement and enforce Prop 65 in a manner that responds to the former because it can lead to the latter. In the meantime, Prop 65 at least gives Californians the ability to make the best choices available. The proposed regulation will not do this and we urge the agency to instead require canned food manufacturers to provide product-specific warnings on their products. In cases where products were manufactured and labeled before BPA was listed on Prop 65's list, then an interim solution would be signs identifying products with BPA on the shelf. In addition, information should be in languages spoken by significant numbers of people within the community and website databases or company information about can materials should only supplement – and never replace – in store warnings.

Thank you for your consideration of our comments.

Sincerely,

Andria Ventura
Toxics Program Manager

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[1] Krukowski RA et al, (2010), Neighborhood Impact on Healthy Food Availability and Pricing in Food Stores, *Journal of Community Health*, 35:315-320. Walker RE, Keane CR, Burke JG (2010), Disparities and access to healthy food in the United States: A review of food deserts literature, *Health & Place*, 16:876-884 United States Department of Agriculture (June 2009), *Access to Affordable and Nutritious Food: Measuring and Understanding Food Deserts and their Consequences. Report to Congress*. See: http://www.ers.usda.gov/media/242675/ap036_1_.pdf

[2] International Food Information Council Foundation, 2015 Food and Health Survey: Consumer Attitudes toward Food Safety, *Nutrition &Health*, pp. 79-88. See http://www.foodinsight.org/2015-food-health-survey-consumer-research

[3] Kevin B. Comerford. Frequent Canned Food Use is Positively Associated with Nutrient-Dense Food Group Consumption and Higher Nutrient Intakes in US Children and Adults. Nutrients. 2015 Jul; 7(7): 5586-5600. http://www.ncbi.nlm.nih.gov/pmc/articles/PMC4517017/. U.S. Department of Agriculture, Food and Nutrition Service, Office of Research and Analysis, "SNAP Food Security In-Depth Interview Study," by Kathryn Edin et al.. Project Officer: Sarah Zapolsky, Alexandria, VA: March 2013.

[4] Clean Water Action, *What's In the Packaging: Unveiling the Toxic Secrets of Food and Beverage Packaging* (2016). http://www.cleanwateraction.org/sites/default/files/CA_TIP_rpt_08.24.16a_web.pdf

[5] Geueke B, Wagner CC, Muncke J (2014), Food contact substances and chemicals of concern: a comparison of inventories, Food Addit Contam Part A Chem Anal Control Expo Risk Assess, 31:1438-1450.