



April 26, 2016

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Via Email

Re: Comments on Proposed Changes to Revisions of Title 27, California Code of Regulations, Article 6, Clear and Reasonable Warnings

Dear Ms. Vela:

On behalf of Environmental Law Foundation, As You Sow, Center for Environmental Health, Lexington Law Group, and Mateel Environmental Justice Foundation, we submit the following comments on OEHHA's most recent draft of its proposed changes to Proposition 65's warning regulations.

Initially, we are disappointed to see that OEHHA has disregarded the vast majority of the detailed comments we submitted in response to its previous draft.¹ We incorporate those previous comments by reference here, and urge OEHHA to take a closer look at the fundamental problems we identified in those comments. In particular:

- OEHHA should scrap section 25600.2 in its entirety as it will severely hamper Proposition 65's effectiveness in ensuring that Californians are provided with clear and reasonable warnings before being knowingly and intentionally exposed to known carcinogens and reproductive toxicants.
- OEHHA should insist that any warnings be provided prior to the point of sale and that internet warnings can be automatically viewed by the consumer without the need to follow a hyperlink. (*See Ingredient Communication Council, Inc. v. Lungren* (1992) 2 Cal.App.4th 1480, 1494 ("An invitation to inquire about possible warnings

¹ See Environmental Coalition letter to OEHHA (Jan. 25, 2016) ("Coalition Letter"), http://www.oehha.ca.gov/prop65/CRNR_notices/WarningWeb/pdf/comments/EnvironLawFoundationcomments012516.pdf.

on products is not equivalent to providing the consumer a warning about a specific product.”.)

OEHHA’s failure to address these and the other problems identified in our previous comments is exacerbated by several of the new proposed changes to the warning regulations that are included in the latest draft. Specifically, we oppose watering down the safe harbor warning language, the removal of size minimums for certain warnings, and allowing supplemental information to contradict Proposition 65 warning, especially while remaining within the safe harbor. At the same time, we see some progress in certain of the revisions and suggest ways to improve them even further. We do, however, object to the presentation of these changes without analysis and call on OEHHA to provide a statement of reasons explaining its choices. We discuss these issues specific to the March 25, 2016 revisions below.

I. The Revisions to the Warning Language Add Ambiguity

With respect to the warning language, the new draft inserts the words “such as” before the name of the chemical. (See Proposed Regulatory Text for Public Comment (Mar. 25, 2016) (“Proposed Regulations”), §§ 25603(a)(3), 25605(a), 25607.2(a).)² Under the previous draft, the warning read: “This product can expose you to [name of one or more chemicals], a chemical [or chemicals] which is [are] known to the State of California to cause” cancer or reproductive harm. Under the recent revisions, the warning now reads: “This product 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 reproductive harm.

This change introduces ambiguity about whether the product will cause an exposure to the named chemical. Previously, the language was clearer: the required text simply stated that the product could cause an exposure to the named chemical. Under the revised language, the words “such as” introduce ambiguity about whether the product even contains the named chemical; it might expose a user to the named chemical, or it might contain an entirely different chemical. Combined with the inherent vagueness of the words “can expose,” the reader has no way to know whether an exposure will occur or to what chemical.

Consider a warning that a product can expose you to “chemicals such as lead.” The warning might refer to lead, or it might refer to something else. There is no way to know whether or not there is lead in the product. This ambiguity did not exist in the previous draft.

This particular problem could be solved by replacing the words “such as” with

² Unless otherwise noted, further citations to the Proposed Regulations are to the March 25, 2016 draft.

“including.” Indeed, even the California Chamber of Commerce suggested this language in its January 25, 2016 letter.³ Using “including” rather than “such as” makes it clear that the product can in fact cause an exposure to the named chemical.

But even with this change, another source of confusion remains—the new revisions imply that there are exposures from more than one chemical even if the exposure is really only for one chemical. As one court wrote in discussing the inherent ambiguity of the phrase “such as,” “If nothing else, the phrase “such as” reveals unmistakably that other examples exist.” (*United States v. Aisenberg* (M.D. Fla. 2003) 247 F.Supp.2d 1272, 1308 rev’d in part, vacated in part, (11th Cir. 2004) 358 F.3d 1327; see also *Robinson v. HD Supply, Inc.* (E.D. Cal. 2014, No. 2:12-CV-00604-GEB-AC) 2014 WL 585416, at *1 (“[T]he words ‘such as’ in this motion are ambiguous.”).)

We acknowledge that this is a difficult drafting problem. But we believe that the language in the November 2015 draft regulations was clearer than this new language.⁴ The new revisions are a step backward.

II. The Revisions to the Retailer Provision Are Insufficient To Address The Fundamental Problems We Previously Identified.

This coalition has repeatedly opposed previous versions of section 25600.2 and we maintain our opposition. However, as OEHHA intends to move forward with its adoption, the agency must ensure that this provision does not conflict with Proposition 65 or leave gaps in the law’s health and safety protections. Unfortunately, the most recent draft continues to do just that.

First, section 25600.2(a) inaccurately states OEHHA’s obligation under Proposition 65, which does not require OEHHA to “minimize the burden on retail sellers” without adding that OEHHA is only required to do so “to the extent practicable.” (Health & Saf. Code § 25249.11(f); see Proposed Regulations, § 25600.2(a).) This language should either be eliminated, or amended to conform to the statute as follows:

- (a) Section 25249.11 of the Act requires that, in 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 on the retail seller, except where the retail seller itself is responsible for introducing a chemical known

³ California Chamber of Commerce Coalition Letter to OEHHA (Jan. 25, 2016), p. 4 (“Chamber Letter”), http://www.oehha.ca.gov/prop65/CRNR_notices/WarningWeb/pdf/comments/CaChambercomments012516.pdf.

⁴ We stand by our suggestion in our letter of January 25, 2016 to add the words “contains” to the warning to increase clarity. (See Coalition Letter, *supra* note 1, at p. 11.)

to the state to cause cancer or reproductive toxicity into the consumer product in question.

Second, proposed section 25600.2(e)(5) conflicts with Proposition 65 by purporting to authorize retailers continue to sell a product without a warning even if the retailer has “actual knowledge” of an exposure so long as there is an entity upstream that may have Proposition 65 liability for the exposure. In fact, the regulation goes so far as to excuse a retailer from the warning requirement even where the retailer continues to sell a product without a warning even after receiving a 60-day notice identifying that product as causing an unwarned exposure. (See Proposed Regulations, § 25600.2(e)(5), (f).)

Third, this problem is compounded by the fact that the agency is using these warning regulations to indirectly and incompletely address the separate issue of knowledge. Proposition 65 prohibits knowing and intentional exposures to listed chemicals without a clear and reasonable warning and OEHHA has already defined “knowingly” in existing regulations. (Cal. Code Regs., tit. 27, § 25102(n).) We understand OEHHA’s purpose in promulgating these regulations is to address the clear and reasonable warning requirement. But knowledge is a separate issue that deserves its own proceeding. Doing so here will only create uncertainty and is likely to lead to litigation over whether a retailer had knowledge of a particular exposure.

Fourth, while the proposed regulation obligates retailers to provide supplier information to public prosecutors and private attorney generals that are seeking to enforce Proposition 65, there are no consequences for a retailer’s refusal to do so. The whole purpose of this regulation is to maximize the extent to which the warning obligation is passed on to upstream suppliers and manufacturers. Thus, if a retailer refuses to cooperate in ensuring that intent can be effectuated, the retailer should not enjoy any immunity from its warning obligation.

All of the problems discussed above can be addressed by the following language:

(e) The retailer is responsible for providing the warning required by Section 25249.6 of the Act for a product exposure only when one or more of the following circumstances exist:

- (1) The retail seller is selling the product under a brand or trademark that is owned or licensed by the retailer or an affiliated entity;
- (2) The retail seller has knowingly introduced a listed chemical into the product, or knowingly caused a listed chemical to be created in the product;
- (3) The retail seller has covered, obscured or altered a warning label that has been affixed to the product pursuant to subsections (b) and (c);

- (4) The retail seller has received warning information and materials for the exposure pursuant to subsections (b) and (c) and the retail seller has sold the product without conspicuously posting or displaying those warning materials;
- (5) The retail seller continues to sell a product more than five business days after receiving a notice served under Section 25249.7(d)(1) of the Act alleging that the product causes an exposure that requires a warning;
- (6) There is no product manufacturer, producer, packager, importer or distributor of the product that is a “person in the course of doing business” under Section 25249.11(b) of the Act; or
- (7) There is no product manufacturer, producer, packager, importer or distributor of the product that has designated an agent for service of process in California, or has a place of business in California;
- (8) The retail seller of a product that can cause a product exposure refuses to provide the name, address and any other contact information in the retail seller’s possession for the manufacturer, producer, packager, importer and distributor of the product to one of the following persons on written request:
 - (i) The lead agency, the Attorney General, any district attorney, or any city attorney with authority to bring an action under the Act.
 - (ii) Any person who has served notice under Section 25249.7(d)(1) of the Act alleging that the product causes a product exposure that requires a warning under the Act.

The person or entity making the request must provide a reasonable description of the product so that the retailer can readily identify it.

III. OEHHA Should Not Allow Companies to Contradict the Proposition 65 Warning While Taking Advantage of the Safe Harbor

In the new revisions, OEHHA has deleted the provision in earlier drafts that would have prevented companies from contradicting the Proposition 65 warning while still receiving the benefit of the safe harbor. (See Proposed Regulations, §§ 25600, 25601(f).) Environmental groups were encouraged at the start of this process when OEHHA included language that prohibited companies that wished to use the safe harbor warning from providing information in addition to the warning text that “contradict[ed], dilute[d], or

diminish[ed]" the warning.⁵ In the November 2015 draft, OEHHA weakened this provision by deleting the words "dilute or diminish."⁶ Environmental groups opposed this change.⁷

Now, OEHHA has removed this provision entirely from the subarticle governing all warnings and weakened it with respect to safe harbor warnings. Both of these changes are unacceptable.

With respect to the safe harbor warning, the new language provides that:

The warning may contain information that is supplemental to the warning content required by this article only to the extent that it explains the source of the exposure or provides information on how to avoid or reduce exposure to the identified chemical or chemicals. Such supplemental information may not be substituted for the warning required by this article.

(Proposed Regulations, § 25601(f).) The prohibition on contradicting the warning is gone. If this revision is adopted, OEHHA should expect companies to "explain[] the source of the exposure" in ways that dilute, diminish, and contradict the effect of the warning. In other words, companies may now be permitted to place contradictory information right next to the warning *while still taking advantage of the safe harbor*. OEHHA must not allow this: if a company provides contradictory information in addition to the warning, it has sailed out of the safe harbor and may no longer take advantage of it. Allowing such a contradiction would subvert the purpose of having a safe harbor warning in the first place.

A safe harbor warning is only one way of providing a warning. Companies are free to provide other warnings. (Health & Saf. Code § 25249.6.) OEHHA should revise section 25601(f) to make it absolutely clear that a company can only use the safe harbor warning if it does not dilute, diminish, or contradict that warning.

While a company may choose to provide a different warning, this does not mean that companies have a free hand to contradict their own warnings. Under Proposition 65's text, a warning complies only *so long as the warning is "clear and reasonable."* (*Ibid.*) It is impossible for a warning to be both clear and reasonable and also contain contradictory statements. Yet OEHHA has proposed deleting the language that prevents companies from doing so. OEHHA should reinsert language into section 25600 that makes it clear that

⁵ See Proposed Regulations (Jan. 16, 2015 draft), § 25600(d), http://oehha.ca.gov/prop65/CRNR_notices/WarningWeb/pdf/ProposedArticle6_cleartext.pdf.

⁶ See Proposed Regulations (Nov. 27, 2015 draft), § 25600(d), http://www.oehha.ca.gov/prop65/CRNR_notices/WarningWeb/pdf/112715WarningRegText.pdf.

⁷ Coalition Letter, *supra* note 1, at p. 2.

contradictory, diluted, or diminished warnings are not “clear and reasonable,” even when a company has chosen not to use the safe harbor language.

The use of the phrase “explains the source of the exposure” is similarly problematic. A company may choose to “explain” the exposure in a manner that undermines the warning—for example, by stating that the given product is not considered harmful under some other regulatory regime. We propose that OEHHA use the phrase “identifies the source” instead of “explains the source,” which aligns more closely to the purpose of the warning.

Any First Amendment objections raised by industry to the above cannot hold water.⁸ OEHHA’s originally proposed language is constitutional. With respect to the safe harbor warning, there can be no objection to restrictions on language that is by its very nature optional—there is *no* issue of compelled speech.⁹

OEHHA should restore the prohibition on supplemental information that “dilutes, diminishes, or contradicts” the warning, especially with respect to the safe harbor warning, as it is designed to provide consumers with clear warnings concerning substances that are carcinogenic or cause birth defects and other reproductive harm. We therefore suggest adding the following at the end of the section 25601(f): “*Provided however*, that if the supplemental language in any way contradicts, diminishes, or dilutes a safe harbor warning as set forth in this subarticle, the warning as a whole is no longer ‘clear and reasonable’ within the meaning of subdivision (a) of this section.”

IV. Some of the Industry-Specific Safe Harbor Warning Regimes Continue to Be Problematic

We have some additional concerns with some of the industry-specific warning regimes. For instance, by referring to “[c]ertain foods and beverages sold or served here” and then giving two specific examples (acrylamide in fried or baked foods and mercury in fish), the restaurant warning will not provide sufficient specificity for consumers to

⁸ See Chamber Letter, *supra* note 2, at pp. 6-7.

⁹ For other laws that prohibit certain warnings, states have the power to ban commercial “communication more likely to deceive the public than to inform it.” *Leoni v. State Bar* (1985) 39 Cal.3d 609, 625 (quoting *Central Hudson Gas & Elec. Corp. v. Public Service Commission of New York* (1980) 447 U.S. 557, 563 (upholding State Bar ruling prohibiting misleading attorney advertising letters)); see also *Bronco Wine Co. v. Jolly* (2005) 129 Cal.App.4th 988, 1004 (First Amendment does not prohibit ban on wine labels with misleading geographical information.) Commercial speech—that is, speech “proposing a commercial transaction, which occurs in an area traditionally subject to government regulation”—is subject to a “lesser protection . . . than to other constitutionally guaranteed expression.” (*Central Hudson, supra*, 447 U.S. at 562.) Supplemental information that contradicts or dilutes the warning is by its nature misleading and there is no constitutional impediment to restricting it.

determine which foods and beverages are subject to the warning. (Proposed Regulations, § 25607.6.) Similarly, the amusement park warning regulation is likely to lead to general, meaningless warning signs that will not allow consumers to make informed choices to avoid exposures to listed chemicals. (Proposed Regulations, §§ 25607.22, 25607.23.)

A better approach would be to require these warnings to identify each source and location affected, or at least the common characteristics of the sources that cause the exposures. As an example, a warning for a parking garage that meets this requirement could read:

The air in this parking garage contains and may expose you to chemicals known to the state of California to cause cancer and reproductive toxicity. Pregnant women are especially advised to avoid or reduce their exposure to automobile engine exhaust, which contains carbon monoxide, a chemical known to cause birth defects.

For prescription drugs, OEHHA proposes to weaken its existing safe harbor regulation, which deems the following to be a clear and reasonable warning: “the labeling approved or otherwise provided under federal law *and* the prescriber’s accepted practice of obtaining a patient’s informed consent.” (Cal. Code Regs., tit. 27, § 25603.3(c) (emphasis added.) For reasons that are unclear from the limited explanations accompanying this set of proposed revisions, OEHHA now proposes to change the “and” to an “or.” (Proposed Regulations, § 25603.3.) The problem with this change is that if a prescription drug is not sold with a federally approved label, the physician will not have the information necessary to provide the patient with an adequate warning about the drug’s risks. For instance, marijuana smoke is listed as a carcinogen under Proposition 65, but there is no federally approved label upon which providers can rely to inform patients about the carcinogenic risks of smoking cannabis. To maximize the chance that patients are provided with meaningful warnings, OEHHA should retain the existing regulation for prescription drug warnings.

We urge OEHHA to fix these and the other problems we have previously identified with the industry-specific warning provisions.

V. Some of OEHHA’s Proposed Revisions Are Steps in the Right Direction, Though There Is Room for Further Improvement

Not all of these proposed revisions are a step back, however, and OEHHA should be commended for proposals that strengthen the warning system. For example, we are happy to see that for Internet purchases, OEHHA has in section 25602(b) proposed including the warning on the product display page itself (although, for reasons we described earlier,¹⁰ we continue to believe that the option of hyperlinking to a different page, even one marked

¹⁰ Coalition Letter, *supra* note 1, at pp. 9-10.

with the word “WARNING” on the product display page, is not sufficient).

We are also happy to see that OEHHA has limited the methods of transmission for consumer product exposure warnings listed in section 25602(a) to posted signs, shelf signs, and shelf tags. In fact, to prevent any confusion on this point and to improve clarity in this area, we suggest that OEHHA eliminate the “labeling” definition from section 25600.1 entirely, as there is essentially no circumstance where “labeling” is being used in a manner distinct from “label.” This would also solve the issue raised in our earlier comments regarding warnings provided in manuals.

Finally, we are pleased to see the steps taken to remove ambiguity in the methods of transmission and content of environmental warnings. We believe that the proposed requirement that notices that are sent to occupants or published in a newspaper “[c]learly identify the source of the exposure” conveys specific, useful information to the persons affected by the exposure. (Proposed Regulations, § 25604(a)(2)(A), (3)(A).) The same is true for the proposed revision in the required content of all environmental warnings: it is far better and more informative to provide a warning that says, “[Name of one or more exposure source(s)] in this area can expose you to . . .” as opposed to one that says “Entering this area can expose you to . . .” (Proposed Regulations, § 25605(a)(3), (4).) Specifying the source of the exposure is an improvement to the regulation. We recognize that there is inherent ambiguity about what “clearly identify the source” means. Given the vast number of possible exposure scenarios, it would be impossible to set out in a regulation what that would mean in the widely different contexts of a factory, an outdoor petroleum facility, a hotel pool, or an agricultural setting. Rather than do so, we suggest that OEHHA provide examples in its statement of reasons of various environmental exposure scenarios and what “the source” of an exposure in that scenario might be, such that businesses may know to what level of generality they must locate the source of an exposure, and can reason by analogy how to do so in a given situation.

V. OEHHA Should Provide a Statement of Reasons for These Changes

Lastly, we are disappointed by OEHHA’s presentation of these changes without analysis or a statement of reasons. The modifications contain real, substantive changes, as discussed above.

The Administrative Procedures Act requires an agency to publish an initial Statement of Reasons along with a proposed regulation detailing the proposal’s purpose, rationale, and intended benefits. (Gov. Code § 11346.2(b).) But these revisions substantially change the proposed regulation, as discussed above. Thus the Initial Statement of Reasons (“ISOR”) published on November 27, 2015 is no longer valid. OEHHA should revise it to explain the new changes.

The brief description provided on OEHHA’s web site is no replacement for an ISOR; it does little to explain the changes. With respect to the prohibition on contradicting the

warning, for instance, OEHHA states that it was deleted “based on stakeholder comments.”¹¹ But environmental groups advocated for keeping and strengthening the prohibition. The public deserves to know why OEHHA ignored this suggestion and adopted industry’s instead.

As discussed above, these revisions include substantive changes both good and bad and the public is entitled to know the agency’s reasons for adopting them. We hope that OEHHA will provide full analysis of its decisions soon.

Sincerely,



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¹¹ See Modification to Text of Proposed Regulation - Proposition 65 Clear and Reasonable Warnings, http://www.oehha.ca.gov/prop65/CRNR_notices/WarningWeb/Mod_Article6NPR032516.html.