



September 29, 2016

**Via Electronic Mail**

Reference Attorney  
California Office of Administrative Law  
300 Capitol Mall, Suite 1250  
Sacramento, CA 95814-4439  
staff@oal.ca.gov

*Re: Notice of 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, OAL File No. 2016-0926-02EE*

Dear Reference Attorney:

I write on behalf of the Natural Resources Defense Council, to reiterate concerns we raised when the original emergency regulations were considered. The proposed emergency regulations for Bisphenol A (BPA) warnings do not address an emergency. Therefore, we urge the Office of Administrative Law (OAL) to reject this proposal.

According to the Notice, OEHHA's finding of an emergency is based on the specter of consumer confusion from a variety of different warning or a failure to provide warning.

While we agree that businesses may fail to warn and that variations in warnings could create consumer confusion, these problems do not justify these emergency regulations. These risks are present with any Proposition 65 chemical warning because a business can always choose to:

- provide a different warning than the safe harbor warning created by OEHHA
- provide no warning at all, or
- provide a warning for all products.

Nothing about this scenario is abnormal, and thus this situation could have been anticipated in advance and does not require an emergency regulation. Nor does OEHHA explain why such confusion is a larger risk here than for any other products that may require warnings. Businesses already had a full year to develop warnings before the emergency regulations were put in place, a luxury that no other industry has had.

Moreover, the emergency regulation does no more than the existing general regulations (which would otherwise apply) to require that products that contain BPA at a level of concern carry a warning or to require uniformity of warnings. In other words, the emergency regulation does not address customer confusion from a failure to warn or to avoid confusion from variations in warnings. Creating an exemption from the general warning requirements that require product-specific warnings, and instead providing for a generic sign posted at the check-out counter that

does not identify the specific product of concern, could provide even less information than the inconsistencies the Notice warns about.

We agree that a requirement to name the chemical of concern and the health effects associated is an improvement over warnings that fail to do so. However, the emergency regulation does not impose such a requirement. It creates a “safe harbor” for businesses that choose to use the warning that OEHHA has created, but it does not require the use of that warning. Businesses may still choose to and have the option to use less informative warnings.

More importantly, there is no reason that a warning that provides more information on the chemical or its health effects could not also identify which products contain the chemical. In fact, that is precisely what OEHHA has put forward in its finalized general regulations for Proposition 65 warnings. 27 Cal. Code Regs. §§ 25602(a) - (c), 25607.1, 25607.2 (Operative August 30, 2018).

In effect, we do not agree that an emergency exists or that the emergency regulation addresses the problems OEHHA identifies. We urge the Office of Administrative Law to reject the current emergency regulation.

Sincerely,

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