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April 26, 2016

Monet Vela
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Sent Electronically to: P65Public.comments@oehha.ca.gov

SUBJECT: CLEAR AND REASONABLE WARNING REGULATIONS

Dear Ms. Vela:

Pacific Coast Building Products, Inc., and Its Family of Companies ("PCBP") appreciates the opportunity to comment on the Office of Environmental Health Hazard Assessment (OEHHA) Notice of Modified Test of Proposed Regulations, Title 27, Proposition 65 Clear and Reasonable Warnings dated March 25, 2016 [27 CCR §§ 25600, *et seq.*], and the courtesy of extending the comment period to enable us to bring two important issues to the attention of the Office. As this letter indicates, after becoming aware there has been no progress made by more general interest business associations to address our issues of concern, we requested other companies in the business of manufacturing and distributing building materials to join with PCBB in its comments. The attachment to this letter includes the Pacific Coast Building Products, Inc. Family of Companies and the other building materials manufacturing colleagues that have joined us in this effort; we anticipate more companies are concerned and will be joining with us as this process continues. Many of PCBP's and our colleagues' companies' products contain Proposition 65 regulated chemicals, as either naturally-occurring in mineral materials, or as the unintended result of processing such materials. Most of these products are sold for both consumer and contractor use, and are subject to warnings and labeling information under Proposition 65 and the OEHHA regulations, as well as OSHA's Globally Harmonized Hazard Communication Standard (GHHCS). Further, these products are extremely high volume commodities usually packaged in bags printed in the millions per year. Consequently, these products, along with the required Proposition 65 warnings are displayed in virtually every significant home improvement store, contractor business, and worksites in this state.

As a result of such prominent exposure, the building materials industry has been challenged by a significant number of private enforcement actions that have resulted in substantial penalties, defense costs, and reprinting expenses, which, under the circumstances, were as much due to problems in the regulations and enforcement system as any lack of effort to comply with Proposition 65. In this regard, PCBP and its building materials manufacturer colleagues support the objective of OEHHA's Clear and Reasonable Warnings to provide regulatory guidance in the form of objective safe harbor warning requirements, which, if satisfied, will implement the

intent of Proposition 65 to advise consumers of hazards, and preclude unnecessary and costly litigation. However, the building materials manufacturers included in this letter are concerned the OEHHA regulation as currently proposed will fail to meet that objective, as described in the following commentary.

There are two subsections of the proposed rule that have come to our attention, and, upon review, will have a substantial negative effect on our businesses with no sound reason for the current regulatory proposal as written.

Section 25600 General—Adopts "grandfathering" of prior court-approved settlement warnings, but does not allow a business to tailor its warnings to the new regulation, or change its warning to address a new chemical or different product or exposure.

This section of the proposed regulation states:

> "A person that is a party to a court-ordered settlement or final judgment establishing a warning method or content is deemed to be providing a 'clear and reasonable' warning for that exposure for purposes of this article, if the warning fully complies with the order or judgment."

Although this provision is appropriate and should be maintained for businesses with relatively static circumstances that have fashioned warning systems that are appropriate, practical, and effective as approved by a court, there needs to be flexibility in the regulation for warnings by businesses with some products subject to court order, similar products that are not, but must meet the proposed regulation, and, in both cases, if a new chemical needs to be added. The bottom line of the regulation should be that the business required to give the warning should be able to modify a warning to meet the current regulation. Otherwise, there will be an enforcement trap because the same or similar products, or competing products will have different warnings, and some court-approved warnings will be clearly obsolete, and any time a warning needs to be updated to add a new chemical or a new product, the business would have to negotiate with the prior enforcer—this is an untenable situation.

Basalite Concrete Products, LLC and several other building materials businesses have been caught in the trap described. In 1999, in the case of *People v. Ace Hardware*[1], which originated as a private enforcement action brought against a large number of building materials manufacturers due to the potential cancer hazard posed by crystalline silica listed by OEHHA pursuant to Proposition 65. Nearly 100 businesses entered into a Consent Judgment authored by the State Attorney General, requiring clear and reasonable warnings about crystalline silica as a cancer hazard at points of sale and user manuals of powered equipment used to generate respirable dust from building materials containing crystalline silica. The Consent Judgment did not require manufacturers of building materials to provide warning on building materials

[1] San Francisco Superior Court, Case No. 995893.

themselves. In the decade and a half that followed, most manufacturers added crystalline silica cancer warnings to their bagged products, and others included crystalline silica cancer, as well as other chemicals known to cause cancer, birth defects and other reproductive harm. Both of these warning approaches violated the *People v. Ace Hardware* Consent Judgment, and would violate the proposed § 25600 provision in the future. In 2014, As You Sow brought a private enforcement action against Basalite and other building materials manufacturers after it determined cement products contain, in addition to crystalline silica, lead, and hexavalent chromium[2]. Despite the *People v. Ace Hardware* Consent Judgment and the warning system established by it, neither As You So, nor the Attorney General considered themselves bound by the Consent Judgment, and the building materials manufacturers were forced to negotiate expensive settlements with As You Sow, along with mandatory court-approved warnings that are different and potentially non-compliant with the proposed regulation. Consequently, upon promulgation of a final rule, if there is any need to improve its warnings to comply with the current warning, these businesses must return to As You Sow and the court for relief.

Based on the current language of Section 25600, there is nothing that would preclude this same outcome if, for example, a new Proposition 65 chemical were added by OEHHA that is present in cement or other products subject to a Consent Judgment. Furthermore, by placing one segment of a company's products under forced compliance with a consent judgment (meeting the requirements of the regulation, unlikely for prior warnings), but not affording the opportunity for the business to modify its warning to meet the new regulation or add new chemicals, or the regulation has failed in its objective of providing safe harbor guidance and avoiding costly and unnecessary litigation.

PCBP and its colleagues recognize it is unconventional to adopt as a regulation a provision appearing to usurp jurisdiction of the courts' and their issued consent judgments. However, this concern fails to recognize that Proposition 65 is an unusual regulatory statute in that its private enforcement provisions are supervised under statute by the Attorney General. Therefore, before any action to privately enforce Proposition 65 against a violator that has amended its warning to conform to the OEHHA Clear and Reasonable Warning regulation, a 60-Day Notice of Violation must be submitted to the Attorney General [Health and Safety Code § 25249.7(d)]. The Attorney General has regulations in place governing this process, and assuring that warnings under settlements conform to clear and reasonable requirements [11 CCR §§ 3200 – 3204]. As OEHHA is well aware, there have been many instances in which the Attorney General has advised the private enforcers that the case has no merit and should not be brought. The Attorney General has a second opportunity during the 45-day review of settlements prior to court approval [§ 25249.7(f)(4)], during which it may advise the parties and/or the court on the acceptability of the settlement. In such cases in the future, the Attorney General may require through its discretion or by regulation that the defendant may amend its warnings under the Consent Judgment for the sole purpose of conforming with the OEHHA Clear and Reasonable

[2] Alameda County Superior Court, Case Nos. RG 12661017 and RG 13669447.

Warning regulation. In fact, it can be reasonably concluded that such authority already exists because § 3202 states:

> "Health and Safety Code section 25249.7(f)(4)(A) requires that, in order to approve a settlement, the court must find that "Any warning that is required by the settlement complies with" the clear and reasonable warning requirement of Proposition 65. This guideline provides additional information concerning the Attorney General's interpretation of the statute and existing regulations governing clear and reasonable warnings and factors that will be considered in his review of settlements. Nothing in this guideline shall be construed to authorize any warning that does not comply with the statute and regulations, or to preclude any warning that complies with the statute and regulations or to conflict with regulations adopted by the Office of Environmental Health Hazard Assessment. This guideline is intended to address some of the types of warnings commonly found in settlements, not to provide comprehensive standards.
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> (b) Warning language. Where the settling parties agree to language other than the "safe harbor" language set forth in the governing regulations (22 CCR § 12601(b)) the warning language should be analyzed to determine whether it is clear and reasonable."[3] [underscore added]

The clear intent of the statute and these regulations is to assure warnings required by law and directed by OEHHA regulations are clear and reasonable. Requiring a business to have warnings on some products pursuant to a consent judgment, which may be obsolete, and others of the same type, product line, new product, or even when compared to a competitor's product, is not clear and reasonable, and not consistent with Proposition 65.

Therefore, PCBP and its colleagues urge OEHHA to include as an alternative in § 25600 that a business required to provide a warning that does provide such warning in a manner complying with this regulation is deemed to comply, notwithstanding a prior warning pursuant to a consent judgment or settlement not complying with the warning standard of this Article.

The second issue that must be addressed is the yellow exclamation point pictogram set forth at Section 25603 Consumer Product Exposure Warning—Content

The problem this provision poses for PCBP and other building materials manufacturers is its subsection 25603(a)(1) requirement for a black exclamation point in a yellow equilateral triangle with a black outline. Due to the commodity nature of these products, millions of bags and other containers are printed, and to add an additional color—in this case, yellow—is a very large expense that we believe OEHHA should consider as unnecessary. In addition, the Occupational Safety and Health Administration (OSHA) Globally Harmonized Hazard Communication Standard (GHHCS), which went into effect on June 1, 2015 requires pictograms,

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[3] These provisions will require amendment in any event to conform to the OEHHA renumbered regulation. This may provide an opportunity for the Attorney General to address the issue of subsequent modifications to consent judgment warnings to comply with current OEHHA warning regulations.

as well, but these OSHA pictograms must be printed with a red border. We are aware that industry representatives have been unsuccessful in obtaining relief from OSHA from the red color of pictogram outlines, which is a mandatory national, and even international requirement. Therefore, in addition to introducing a second color on warnings imposing a substantial expense, this requirement of the proposed regulation is also unnecessary and counterproductive because its stated purpose is consumer awareness, which is equally achievable by a red border, which arguably heightens consumer awareness more than a yellow background—akin to traffic signals. Further, it is likely that having two different colors will add confusion about the warnings being given.

Finally, the proposed regulation with respect to this issue is internally inconsistent because, at § 25606 Occupational Exposures Warnings, the proposed rule states:

> "(a) A warning to an exposed employee about a listed chemical meets the requirements of this article if it fully complies with all warning information, training and labeling requirements of the federal Hazard Communication Standard (29 Code of Federal Regulations, section 1910.1200), the California Hazard Communication Standard (Title 8, California Code of Regulations section 5194), or, for pesticides, the Pesticides and Worker Safety requirements (Title 3, California Code of Regulations section 6700 et seq.)."

Consequently, products sold for both occupational and consumer use—as are most building materials—are caught in a conflict between yellow exclamation point backgrounds and red-bordered pictograms.

PCBP and its colleagues urge OEHHA to eliminate the color yellow from § 25603(a)(1). OEHHA should, at the same time, clarify that a red border may be used on either or both consumer and occupational warning exclamation point pictograms in compliance with the proposed regulation.

Upon review of the extent of deviation from the Office of Administrative Law's criteria for a properly promulgated regulation, including "clarity" and "consistency,"[4] it is apparent, as indicated above, the proposed regulations do not meet this standard, and OAL would have ample authority to disapprove the regulation. Another concern with respect to the promulgation of the final version of this regulation in that OEHHA has made substantial changes to the prior proposal, and many affected parties, like building materials manufacturers who have not been represented in this proceeding with respect to their specific interests, as the above described example indicates, have not had sufficient time to obtain an industry-wide analysis and response. Consequently, given the impact of the proposed regulation and the changes recently made to it, PCBP joins with other commenters in requesting a longer time now, or a follow-up comment period after further changes in response to current comments.

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[4] California Government Code § 11349.1

PCBP and the companies that have joined in this letter thank OEHHA for its cooperation in considering our comments.

Please contact the undersigned if there are any questions or if additional information is needed.

Respectfully submitted,

DAVID J. LUCCHETTI
President and CEO

ATTACHMENT

Pacific Coast Building Products, Inc., and Its Family of Companies

Pacific Coast Building Products, Inc.
Basalite Concrete Products, LLC
Epic Plastics
Simons Brick Company, Inc.
PABCO Clay Products, LLC
Gladding, McBean
HC Muddox
Interstate Brick
Pacific Coast Supply, LLC
Anderson Lumber
PABCO Building Products, LLC
PABCO Gypsum
PABCO Roofing
PABCO Paper
Pacific Coast Building Services, Inc.
Alcal Specialty Contracting, Inc.
Pacific Coast Contracting Specialties, Inc.

Building Material Manufacturing Companies joining in PCBP's Comments

TopStone®
Calstone