



September 21, 2015

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

Re: Proposition 65: Lead Agency Website Regulatory Proposal

Dear Ms. Vela:

On behalf of the Wine Institute, the Beer Institute and the Distilled Spirits Council of the United States, beverage alcohol trade associations representing the producers of wine, beer and spirits sold within the State of California and across the country, we appreciate the opportunity to comment upon the Office of Environmental Health Hazard Assessment's (OEHHA) proposed regulations regarding the Safe Drinking Water and Toxic Enforcement Act of 1986 ("Proposition 65") concerning the September 4th Lead Agency Website regulatory proposal.

Governor Brown announced in May 2013 that proposed Proposition 65 reforms sought to achieve three primary goals of: (1) ending frivolous "shake-down" lawsuits; (2) improving how the public is warned about dangerous chemicals; and (3) strengthening the scientific basis for warning levels. As we stated in our coalition's April 8, 2015 letter, we continue to be very concerned that the information posted on OEHHA's website will result in more, not less, "shake-down" lawsuits that are without merit and undercut the Governor's objectives underpinning this rulemaking proceeding.

Relative to this proposed rule, we very much know and appreciate that this new initiative would not apply to beverage alcohol given that it was not part of the provisions of the Consent Judgment, nor is the newly-proposed "URL address" signage requirement part of the beverage alcohol Proposition 65 Consent Judgment signage provisions. Nevertheless, we urge the Agency to "rethink" its initiative for several reasons that are applicable to the California business community at large. In that regard, OEHHA's website materials separately and in combination with the proposed "URL address" very well could be viewed as an endorsement by the State of California and/or the affected party/relevant entity of the statements and conclusions set forth in those website materials. The proposed Lead Agency Website rule does not state that OEHHA has peer reviewed the materials posted, nor that an independent assessment has been conducted regarding the merits of the posted documents.

Further, these concerns particularly are salient in light of the following provisions in the proposed rule that places OEHHA in a position where it would be rendering medical advice given that the goals of this website are to provide “strategies for reducing or avoiding exposures to [listed] chemicals ... [and] assist individuals who wish to obtain additional information about listed chemicals, their effects, nutritional benefits, health concerns or related issues.” (See proposed Section 25205(a)(2) and (a)(3).)

We appreciate the newly-proposed disclaimer language in Section 25205(a)(6), which provides that “OEHHA cannot assure the accuracy of information it has received from third parties.” This disclaimer, however, does not go far enough and businesses providing a Proposition 65 warning remain at risk for frivolous lawsuits based upon information posted on OEHHA’s website. To protect OEHHA and businesses from unwarranted lawsuits, our coalition urges that a new, separate subsection be added to Section 25205 that would read as follows:

(h) No private right of action and/or legal claim may be based upon, directly or indirectly, the information posted on the website and no liability will accrue to any party for the information posted pursuant to this section.

This request is consistent with Governor Brown’s stated goals in May 2013. In that regard, in today’s litigious environment, the easily foreseen circumstances of this proposal will result in more, not less, lawsuits that are without foundation and undercut the purpose of this rulemaking initiative, as well as the underpinnings of the Safe Drinking Water and Toxic Enforcement Act itself.

We also would like to use this opportunity to reiterate the additional points in our April comment that were not addressed in the September 4th proposal, which include the following using beverage alcohol as an example. As OEHHA more than likely knows, beverage alcohol is one of the most studied compounds over the decades and across the centuries, with thousands of studies published about beverage alcohol and health each year. For example, there were over 3,750 publications about beverage alcohol and health in 2014. Consequently, there are a myriad of scientific reports and assessments about beverage alcohol consumption, including the Dietary Guidelines for Americans published by the U.S. Department of Health and Human Services and the U.S. Department of Agriculture every five years since 1980.

Each edition of the Dietary Guidelines for Americans has included a guideline regarding alcohol consumption that references potential risks and benefits of consuming beverage alcohol products. The Dietary Guidelines for Americans serve as the basis for nutrition advice and public policy for all Americans. Would the posting of this document on OEHHA’s website run afoul of proposed Section 25600(d) stating that supplemental information regarding the warning may not “contradict, dilute, or diminish the warning?” (Presumably, the referenced proposal refers to materials that an entity posts on the OEHHA website; if not, its purpose and objective are unclear. Separately, the provisions of this proposed rule inevitably will provide “fodder” for opportunistic litigation against entities subject to Proposition 65.)

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Further, although OEHHA characterizes the furnishing of information for its website as upon “request,” it will be viewed as a mandate and be a receptacle for a myriad of “scientific” reports and information that may be inconsistent or conflict with the body of scientific literature. Affected parties would be forced to be constantly vigilant in reviewing OEHHA’s website materials since those documents could be viewed as an admission against interest, though they had no control or say regarding their posting; yet another reason for the incorporation of the proposed subsection (h) in any Lead Agency Website proposal.

On behalf of the beverage alcohol community, we urge OEHHA, at a minimum, to amend the Lead Agency Website rule with the addition of a disclaimer precluding private rights of actions based upon information posted on your website.

With best regards,



Mr. Wendell Lee
Wine Institute



Ms. Mary Jane Saunders
Beer Institute



Ms. Lynne J. Omlie
Distilled Spirits Council