



October 21, 2019

Monet Vela
Office of Environmental Health Hazard Assessment (OEHHA)
1001 I Street, 23rd Floor
P. O. Box 4010
Sacramento, California 95812-4010
Telephone: 916-323-2517
Fax: 916-323-2610
e-mail: monet.vela@oehha.ca.gov
P65Public.Comments@oehha.ca.gov

Sent via e-mail and electronic submission

Re: Comments on Modifications to Proposed Amendments to Article 6, Clear and Reasonable Warnings, Section 25600.2, Responsibility to Provide Consumer Product Exposure Warnings

Dear Ms. Vela:

As You Sow submits the following comments on OEHHA's modified proposed amendments to Article 6, Clear and Reasonable Warnings, section 25600.2, Responsibility to Provide Consumer Product Exposure Warnings, published for comment on October 4, 2019.

We appreciate OEHHA's intent to clarify and address comments raised by *As You Sow* in the latest round of proposed text. However, we reiterate our concerns with the proposed amendment to California Code of Regulations, title 27, section 25600.2, that we raised in prior comments.

I. OEHHA's Proposed Amendments to Subsection 25600.2(b) and (c) Violate Proposition 65's Warning Requirement, and Exceed OEHHA's Statutory Authority.

Specifically, we incorporate sections I and II of our January 11, 2019 letter, which explain in detail that the proposed amendment is contrary to Section 25249.11(f) of the Act, which requires the warning regulations to place the duty to warn on the producers "to the extent practicable." (Cal. Health & Safety Code § 25249.11(f)). Even with the proposed modifications, the proposed amendments inappropriately limit producers' responsibility to comply with Proposition 65 by allowing a simple pass-through of materials to intermediaries to satisfy their duties under the law, without any guarantee from the receiving party that end users will receive a warning about their exposure to the listed chemicals. We believe there is no justifiable reason to allow the producer, which is best situated to: (1) develop a product without listed chemicals or (2) provide on-product warnings, to avoid responsibility under law. OEHHA has provided no justification for reducing a consumer's protection under the law in this manner.

We urge that OEHHA withdraw the proposed amendments to subsections 25600.2(b) and (c)(1). Alternatively, OEHHA should revise the proposed amendments such that the producer ultimately



remains liable for any failures to provide warnings for its products or must otherwise ensure that warnings are provided to the ultimate consumer of its products, including requiring that distributors and retail sellers provide proof of compliance.

II. Subsection 25600.2(e)(5) Inappropriately Absolves Retail Seller of Liability for Knowingly and Intentionally Exposing Individuals to Listed Chemicals Without a Warning, in Violation of Proposition 65.

We further incorporate section III of our January 11, 2019 letter, and suggest that OEHHA revisit subsection 25600.2(e)(5) of the Code of Regulations. While Proposition 65 instructs that OEHHA must promulgate regulations that, “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,” it does not authorize OEHHA to excuse retail sellers from liability for knowingly and intentionally exposing individuals to listed chemicals without a warning where an upstream entity is subject to Proposition 65 and is amenable to jurisdiction in California state courts. (Health & Safety Code § 25259.11(f)).

Proposed modifications to the text of Subsection 25600.2(e)(5) provide that a retail seller is responsible for providing the warning for a consumer product exposure only if: (1) the retail seller “has actual knowledge” of the exposure; and (2) there is no upstream entity in the chain of distribution who is both a “person in the course of doing business” under Proposition 65 and has a designated agent for service of process or a place of business in California. Some retail sellers, particularly e-commerce retailers, have interpreted this provision to allow them to knowingly and intentionally expose consumers to listed chemicals in consumer products without a warning, where there is a single entity in the upstream supply chain that falls within the purview of Proposition 65, even if that upstream entity has not provided adequate warnings. (Cal. Code Regs., tit. 27, § 25600.2(e)(5)). We believe that both entities should retain responsibility under the law to help ensure that consumers are protected. Thus, OEHHA should take this opportunity to revise section 25600.2(e)(5) to make clear that a retail seller with knowledge that a product exposes consumers to a listed chemical without a warning has an obligation to provide a warning irrespective of the identity of the product’s manufacturer, importer, distributor or supplier.

III. OEHHA’s Proposed Amendments to Subsection 25600.2(f) Should Be Revised to Require the Same Level of Specificity for Product Identification as Required for a Notice of Violation.

We incorporate Section IV of our January 11, 2019 letter, concerning proposed amendments to Subsection 25600.2(f) to clarify the meaning of the phrase “actual knowledge” as used in the current regulatory text. While we agree with OEHHA’s proposed modifications clarifying who can receive information regarding potential consumer product exposure on behalf of a retail seller, the proposed amendment creates an exception to the duty to warn that contradicts existing Proposition 65 jurisprudence. Current regulations explain that an exposure is “knowing” where a party has “knowledge of the fact that a discharge of, release of, or exposure to a chemical listed pursuant to Section 25249.8(a) of the Act is occurring.” (Cal. Code Regs., tit. 27, § 25102(n)). This knowledge may be actual or constructive. (See, e.g., Final Statement of Reasons Revised (November 4, 1988) for former Cal. Code



Regs., tit. 22, § 12201.) (stating that the “Agency interprets the requirement that exposure be ‘knowing and intentional’ to include exposures about which there is constructive knowledge.”).

As drafted, the proposed amendment may be interpreted to allow a retail seller to sit back and wait for specific communication “received by the authorized agent or a person whose knowledge can be imputed to” the retail seller, even if it otherwise has knowledge that it is selling a product for which a warning is required through other means that any responsible seller would have reason to be aware of, for example information reported in mass or social media, governmental sources, public health databases, trade publications, or formal and informal consumer communication. In the interest of consumer protection, Proposition 65 does not allow a retail seller to knowingly and intentionally expose individuals to listed chemicals without a warning, regardless of how that knowledge was obtained.

We are concerned that OEHHA’s proposed amendment may be interpreted as creating a heightened level of specificity to enforce Proposition 65 against a retail seller. OEHHA’s existing regulations state that a notice of violation alleging a consumer product exposure need only provide “sufficient specificity to inform the recipient of the nature of the items allegedly sold in violation of the law and to distinguish those products or services from others sold or offered by the alleged violator for which no violation is alleged.” (Cal. Code Regs., tit. 27, § 25903(b)(2)(D)). OEHHA’s proposed amendment, requiring information “that allows it to identify the specific product or products that cause the consumer product exposure,” may be interpreted to set a higher bar, thus creating inconsistent application of the Act. This is particularly true for e-commerce retailers who offer the same product for sale on their website under numerous listings or identification numbers. Such retailers have routinely denied “actual knowledge” of product exposures based on arbitrary, self-defined classifications.

Accordingly, we urge that OEHHA withdraw the proposed amendment to subsection 25600.2(f) defining “actual knowledge” or replace that language with the current language set forth in the California Code of Regulations, title 27, section 25903(b)(2)(D).

IV. OEHHA’s Proposed Amendments to Subsection 25600.2(g) Should Prohibit Willful Blindness in the Supply Chain

Subsection 25600.2(g), creates an obligation that a retail seller “promptly provide the name and contact information for the manufacturer, producer, packager, importer, supplier, and distributor of the product... to the extent that this information is reasonably available to the retail seller.” OEHHA should take this opportunity to clarify that a retail seller must maintain the name and contact information for a verified, legally responsible party of the manufacturer, producer, packager, importer, supplier, or distribution of the product. Consumers are entitled to this transparency.



CONCLUSION

Proposition 65 places the legal obligation to provide warnings to consumers on all businesses in the supply chain. OEHHA's current regulations are inconsistent with this obligation. A system in which all entities have potential liability will best ensure that the consumer ultimately receives the warning required by law. We hope OEHHA will meaningfully consider our input.

Thank you for providing this opportunity to comment on these important issues.

Sincerely,

Chelsea Linsley
Staff Attorney
As You Sow