Final Statement of Reasons
Title 27, California Code of Regulations
Article 2
Guideline and Safe Use Determination Procedures
Proposed Section 25205
Lead Agency Website

California Environmental Protection Agency
Office of Environmental Health Hazard Assessment

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I. General information

The Office of Environmental Health Hazard Assessment (OEHHA) published the proposed regulation and Initial Statement of Reasons (ISOR) for this action on January 16, 2015, and held a public hearing on March 25, 2015. The initial comment period ended on April 8, 2015 and OEHHA received 26 written comments.

After careful consideration of the comments received during the initial comment period, OEHHA published a **Notice of Modification to Text of Proposed Regulation** on **May 22, 2015**. The changes consisted of the following:

- Non-substantive changes were made to subsection (b) regarding OEHHA's disclaimer on the website.
- In response to stakeholder concerns regarding the scope of the information OEHHA may request from businesses, subsection (b)(10) was modified to limit information requested to that concerning exposures to listed chemicals for which warnings are being provided under Health and Safety Code Section 25249.6.
- In response to comments that responding to a request for information would result in costs associated with testing, OEHHA added subsection (c). This subsection provides that testing is not required for the sole purpose of providing information in response to a request for information under this section.
- OEHHA extended the notice period required for notification of a business that information provided to OEHHA would be disclosed under subsection (d). The notice period was extended from fifteen (15) days to thirty (30) days in response to stakeholder concerns that 15 days would not allow sufficient time for a business to provide additional justification or initiate legal proceedings to protect the claimed trade secrets.
- The term "Confidential Business Information" was replaced with the term "trade secret" for consistency with the use of the term in the California Evidence Code and Public Records Act and is now defined by reference to Civil Code section 3426.1.

The public comment period related to this notice of modification was originally scheduled to close on **June 6, 2015**; however, OEHHA granted a request from the California Chamber of Commerce to extend the public comment period to **June 15, 2015**. Eleven comments were received during this comment period.

After careful consideration of the comments, OEHHA published a second **Notice of Modification of Proposed Text** on **September 4, 2015**. In addition to minor non-substantive corrections to the text, OEHHA made the following changes:

- Subsection (a) was modified to more accurately reflect the anticipated functions of the website.
- Subsection (a) was revised to further clarify the scope of the OEHHA disclaimer to include all information received from third parties.
- Subsection (b) was modified to respond to public comments indicating that the timeframe for a business to provide requested information is unclear and should be limited; this proposed modification would establish a 90-day period for a business to respond to a request for information.
- Subsection (b)(4) was modified to include the source of exposure to a chemical for which an environmental warning is being provided. This modification would provide more information for individuals exposed to listed chemicals to better ascertain the origin of the environmental exposure.
- Subsection (b)(10) was revised in response to comments that the scope of information requested under this section was overbroad.
- Subsection (c) was modified by striking “sole” and “solely” in response to comments that the terms were vague.
- A new subsection (d) was added in response to comments that businesses should be able to respond to lead agency requests via trade groups.
- Finally, a new subsection (f) was added in response to comments that the regulation should explicitly state that a business is not required to provide information to OEHHA that is subject to legal privileges under California law.

The comment period ended **September 21, 2015** and five comments were received. OEHHA did not modify the text further in response to comments received during this final comment period. OEHHA’s response to the comments received during this rulemaking process is incorporated within this **Final Statement of Reasons (FSOR)**.

Several written and oral comments submitted throughout the regulatory process included observations about this regulation or other laws and regulations that do not constitute an objection or recommendation directed at the proposed action or the procedures followed in this rulemaking action. Also, many parties offered their interpretation of this regulation or other laws and regulations, sometimes in connection with their support of, or decision not to object to the regulation, which again does not constitute an objection or recommendation directed at the proposed action or the procedures followed in this rulemaking action. Accordingly, OEHHA is not required under the Administrative Procedure Act (APA) to respond to such remarks in this FSOR. Since OEHHA is constrained by limitations upon its time and resources, and is not

obligated by law to respond to such remarks,[1] OEHHA may not provide responses to all or any of these remarks in this FSOR. However, the absence of responses to such remarks should not be construed to mean that OEHHA in any way concurs with them.

II. Summary and response to comments received during the initial comment period of January 16, 2015 through April 8, 2015.

The following organizations submitted comments on the proposed regulation to OEHHA during the initial comment period: [2]

The Adhesive and Sealant Council (ASC)
American Chemistry Council (ACC)
American Chemistry Council on Behalf of a Coalition of Product Manufacturers (ACC-CPM)
American Coatings Association (ACA)
American Herbal Products Association (AHPA)
American Wood Council (AWC)
Association of Home Appliance Manufacturers (AHAM)
Alliance of Automobile Manufacturers and Global Automakers (AAMGA)
APTCO/Riddell Williams
AXIALL
Business and Industrial Furniture Manufacturers Association (BIFMA)
California Attractions and Parks Association, Inc. (CAPA)
CalChamber Coalition (CCC)
California Council for Environmental Economic Balance (CCEEB)
California Dental Association (CDA)
Consumer Healthcare Products Association (CHPA)
Council for Responsible Nutrition (CRN)
Frozen Potato Products Institute (FPPI)
The Halogenated Solvents Industry Alliance, Inc. (HSIA)
Independent Lubricant Manufacturers Association (ILMA)
National Marine Manufacturers Association (NMMA)
Phylmar Regulatory Roundtable (PRR)
Rubber Manufacturers Association (RMA)
Sashco, Inc.

[1] California Government Code section 11346.9 (a)(3)
[2] Several of the comments were submitted as part of the concurrently proposed Article 6 Clear and Reasonable Warnings regulation. These are separate regulatory processes; however, OEHHA has opted to respond to the comments as part of the Lead Agency Website rulemaking.

Wine Institute, the Beer Institute and the Distilled Spirits Council of the United States (Wine et al.)
Western States Petroleum Association (WSPA)

The following organizations provided only oral comments at the public hearing on March 25, 2015:

Center for Environmental Health (CEH)
U.S. Battery Manufacturing (USBM)
W.S. Dodge Oil (WSDO)

The oral and written comments are summarized and responded to below:

A. Section 25205(a)

1. **Comment (ACC, ACA, WSPA):** In subsection (a)(2), OEHHA offers manufacturers the opportunity to review information and request corrections after it has already been posted; however, manufacturers should be offered this opportunity before posting.

Response: The commenters correctly noted that manufacturers are provided an opportunity to review information and request corrections after it has been posted. OEHHA believes that the routine submittal of information to stakeholders for review prior to posting will discourage public acceptance of the website as a credible, unbiased source of information. As it does with all of its work products, OEHHA will endeavor to ensure the accuracy of information on the website, and after posting will correct information that is shown to be inaccurate.

2. **Comment (ACC):** OEHHA should conduct both an agency-wide review and an interagency review to ensure that public communications about products, facilities, and chemicals are being made in a consistent manner across all California state agencies to avoid misleading or confusing the public.

Response: This comment is not directed at the proposed rulemaking and as such requires no response.

3. **Comment (ACC):** OEHHA lacks procedures to ensure the quality, objectivity, utility, and integrity of website information. In addition, OEHHA does not offer procedures to allow for prompt correction of incorrect or inaccurate information nor procedures for manufacturers who wish to offer other contextual information.

Response: OEHHA intends to ensure the accuracy of the information it provides on its website to the greatest extent possible, consistent with its mission to protect public health and the environment. OEHHA anticipates that most information provided on the website will be obtained from authoritative agencies and will be compiled and reviewed

by OEHHA scientific and legal staff. OEHHA will review information submitted by third parties, and will implement a process for review of and removal of alleged inaccurate information. Additionally, OEHHA has included a disclaimer in subsection (a)(6) regarding the accuracy of information provided by third parties. In terms of procedures for submission of contextual information, manufacturers and other interested parties may submit information directly to OEHHA to be considered for publication on the website. The website is currently in development and will include a “contact us" feature to allow for such comments. OEHHA retains its discretion concerning the content that may be posted on the website and will not automatically post material received from third parties.

4. **Comment (ACC):** ACC states, “There should be a clear disclaimer that the site does not present complete information; that safety, safe use, warning, and use instructions are omitted; and that site content is controlled by OEHHA. Manufacturers should have no liability for failure to provide complete information or adequate warnings on acute hazards where OEHHA controls the information posted on the site.”

Response: The website will clearly reflect that it is owned and managed by OEHHA and will contain information compiled by OEHHA technical staff in much the same way as OEHHA’s existing website. There is no basis for concern that the public would be confused about the source of the information. OEHHA has included a disclaimer in subsection (a)(6) for information submitted to OEHHA for publication on the website. The scope of the website information is specific to Proposition 65 and warnings being provided pursuant to that law. The website is not intended to be a collection of all possible information regarding a product, but rather will provide information related to warnings for exposures to chemicals listed under Proposition 65. General safety, safe use, non-Proposition 65 warnings and use instructions not related to an exposure to a listed chemical will generally not be included on the website. OEHHA therefore declines to make the change requested by this commenter.

5. **Comment (ACC):** OEHHA should not disclaim the accuracy of information for which the agency is responsible. In addition, OEHHA should develop a process to reconcile inconsistencies so that accurate and reliable information is provided in the website.

Response: The disclaimer of information in subsection (a)(6) is limited to information received from third parties for publication on the website. Under subsection (a)(5) OEHHA will provide a process for a person to request a correction of material provided on the website. The website is currently in development and will include a “contact us" feature to allow for such comments.

6. **Comment (ACC):** If OEHHA seeks to post scientific information that has not been peer reviewed, published, or otherwise validated such information should also be considered for inclusion in a disclaimer.

Response: ACC provided no authority for the proposition that all materials published on a public website must be peer reviewed. All information submitted to OEHHA for possible inclusion on the website will be reviewed and considered by OEHHA scientific and legal staff prior to publication on the website. Much of the information will be collected by OEHHA from authoritative entities. The proposed regulation includes a disclaimer that covers information submitted by third parties.

7. **Comment (ACA):** ACA urges OEHHA to carefully consider the information it posts. Although OEHHA does not consider the information on the website to be a "regulation," when OEHHA releases information on the website, it will be considered accurate and will carry weight with the public.

Response: OEHHA scientific and legal staff will review and consider all information obtained for publication on the website. OEHHA has also included a disclaimer of information from third parties under subsection (a)(6).

8. **Comment (ACA, AHPA):** In subsection (a)(7), the disclaimer focuses on manufacturers, producers, distributors or importers of products, and does not address all of the other resources that OEHHA can use when developing its website. OEHHA cannot guarantee the accuracy of any of the information it receives, and therefore OEHHA should disclaim all information on the Lead Agency Website.

Response: OEHHA has removed the reference to manufacturers, producers, distributors or importers in subsection (a)(6)[3] so that information received from all third parties for publication on the website is disclaimed.

9. **Comment (AHPA):** AHPA states that it is unclear whether the website is intended to provide general information about categories of products and exposures or whether it may contain specific information about specific brands of products.

Response: The types of information OEHHA intends to include on the website are set out in section 25205(a). OEHHA plans to provide the information in a way that does not generally focus on particular brands or products. The primary purpose of the website is to provide general information to the public regarding exposures to listed chemicals for which warnings are being provided. The site will primarily focus on categories of products and types of locations where exposures to listed chemicals can occur.

10. **Comment (AHPA):** Section 25205(a)(1) states that the website will "display the information provided pursuant to subsection (b)" implying that the website is intended to present brand-specific information. This impression is supported by Section 25205(d) which states that an individual firm's compliance with the website requirements shall not

[3] The disclaimer referenced by the comments was initially proposed as subsection (a)(7) but was subsequently renumbered to subsection (a)(6).

be deemed to constitute compliance with the requirement to provide "clear and reasonable" warning. AHPA opposes a general practice of including brand-specific information on the website and more strongly opposes the prospect of "occasionally" singling out specific businesses for special treatment and public disclosure on the website, separate from their market peers. If brand-specific information is to be included, it is imperative that all brands with similar products be treated similarly. Section 25205(a)(1) should be revised to specify that only aggregated information and no brand-specific or company-specific information will be published.

Response: The specific phrase "display the information provided pursuant to subsection (b)" was stricken in the August 2015 modification of text. The types of information OEHA intends to include on the website are set out in section 25205(a). OEHHA plans to provide the information in a way that does not generally focus on particular brands or products. The primary purpose of the website is to provide general information to the public regarding exposures to listed chemicals for which warnings are being provided. The site will primarily focus on categories of products and types of locations where exposures to listed chemicals can occur.

11. **Comment (AHPA, BIFMA, NMMA, RMA):** AHPA further objects to the provision in proposed Section 25205(a)(2) that "any person" may provide information to OEHHA for posting on the website. Only the manufacturer or brand owner would have sufficient data to provide accurate and complete data regarding the brand's products. Allowing any person to submit information may lead to inaccurate postings and unnecessary legal challenges.

Response: The specific sentence cited by the commenter, "Any person may provide the lead agency with information that may be posted on the website, in the lead agency's discretion," was stricken in the August 2015 modified text. Much of the information collected by OEHHA will be obtained from authoritative entities. The proposed regulation includes a disclaimer that covers information submitted for publication on the website by third parties. Information submitted to OEHHA for publication by third parties on the website will be reviewed and considered by OEHHA scientific and legal staff prior to publication on the website.

12. **Comment (AHPA):** Section 25205(a)(3) lists a number of common routes or pathways of exposure and notably absent is drinking water, which is a significant common route of exposure. It is essential that the levels of listed chemicals provided in drinking water be discussed on the website. Without this information, the data provided with respect to other sources of exposure are inherently misleading. The website should include a database in which consumers may look up historical data for listed chemicals in the drinking water provided by their water supplier with the data presented in a format that will facilitate direct comparison of the drinking water levels of individual chemicals with the exposure levels caused by other commercial products.

Response: Section 25205(a)(1), initially proposed as Section 25205(a)(3), is a non-exclusive list of common routes of exposure. The reference to "common environmental scenarios" in the regulation would cover exposures through drinking water. The comment that the website should enable the public to compare exposures to listed chemicals from products with exposures from drinking water is a suggestion for information that OEHHA could include on the website, and is not a comment on the proposed regulation. OEHHA is not required to provide a response to the commenter's suggestion. Additionally, most drinking water providers are not subject to the Act.[4]

13. **Comment (AAMGA):** The language of the rule should be strengthened to stress the importance of protecting against the disclosure of trade secrets and confidential business information in the development of the Lead Agency Website. Otherwise, there is a significant potential that legitimate concerns regarding intellectual property rights and competition could be overwhelmed by the effort to compile information for the website. Public disclosure of trade secret and confidential business information should be prevented.

Response: In response to concerns from stakeholders regarding disclosure of trade secrets and confidential business information, OEHHA has included subsection (e) in the August 2015 modified text that provides a business the opportunity to request a designation of information as a trade secret that is exempt from disclosure under the Public Records Act and provisions of the Evidence Code, and also included subsection (f) which clarifies that pursuant to existing law, a businesses need not provide OEHHA with information that is exempt from disclosure under the legal privileges described in Evidence Code section 954 (attorney-client privilege) or California Code of Civil Procedure section 2018.030 (attorney work product).

14. **Comment (AAMGA):** OEHHA should provide consumers with high-level information on exposure routes and reducing exposure rather than "supplemental, contextual information" as stated in the ISOR. OEHHA should provide information on the uses, sources, and health effects of these chemicals to help consumers make an informed decision.

Response: The types of information OEHHA intends to include on the website are set out in Section 25205(a). OEHHA plans to provide the information in a way that does not generally focus on particular brands or products. The primary purpose of the website is to provide information to the public regarding exposures to listed chemicals for which warnings are being provided. The site will primarily focus on categories of products and types of locations where exposures to listed chemicals can occur.

[4] Health and Safety Code section 25249.11(b)

15. **Comment (CDA):** CDA supports the website so long as the process allows for professional organizations like CDA to provide relevant chemical and exposure information on behalf of its members as a supplement to the warnings required under Section 25249.6.

Response: Other regulatory proposals cover the issue of a given industry providing supplemental information directly to consumers.[5] In the context of this regulation, in response to stakeholder comments, subsection (d) of the proposed regulation allows businesses to respond to a request for information through their trade organization when the lead agency requests information under subsection (b) from two or more businesses regarding the same product or exposure. The information provided can then be used for a general discussion of the types of products that may cause exposures without the need to name any particular brand. The types of information OEHHA intends to include on the website are set out in section 25205(a).

16. **Comment (CHPA):** CHPA appreciates that OEHHA separated the proposed regulation of a Lead Agency Website from the Clear and Reasonable Warnings regulation.

Response: Comment noted, no response to this comment is required.

17. **Comment (CHPA, AAMGA):** It is not clear what type of information OEHHA seeks to collect from product manufacturers.

Response: Subsections (b)(1)-(9) specifically delineate the types of information OEHHA may request from a business. The language in subsection (b)(10) that as originally proposed allowed the lead agency to request any other information that it "deems necessary" was stricken so as to limit the information to information regarding listed chemicals for which warnings are being provided under the Act.

18. **Comment (CHPA):** It is not clear how the OEHHA-maintained website will be developed and structured to ensure greater consumer awareness of exposures and potential means of avoiding exposures, as well as to what extent any included information will be reviewed prior to inclusion on the website.

Response: The types of information OEHHA intends to include on the website are set out in Section 25205(a). OEHHA plans to provide the information in a way that does not generally focus on particular brands or products. The primary purpose of the website is to provide information to the public regarding exposures to listed chemicals for which

[5] OEHHA is separately proposing changes to Article 6 of the implementing regulations which deals with providing clear and reasonable warnings to individuals who may be exposed to listed chemicals; Title 27, California Code of Regulations Proposed Repeal of Article 6 and Adoption of New Article 6 - Clear and Reasonable Warnings (proposed Nov. 27, 2015), available at http://www.oehha.ca.gov/prop65/CRNR_notices/WarningWeb/2NPRArticle112715.html.

warnings are being provided. The site will be primarily focused on categories of products and types of locations where exposures to listed chemicals can occur. Where appropriate, OEHHA will include basic information on how the public can reduce or avoid their exposure to these listed chemicals. OEHHA scientific and legal staff will review and consider all information obtained for publication on the website. Much of the information that will be included is publicly available or will be obtained by OEHHA. However, in some situations it may not be possible for OEHHA to locate information about a particular exposure from public sources. In those situations, OEHHA has the option under proposed Section 25205(b), to request certain information from the businesses that are providing warnings, to the extent the information is available and not subject to privilege. OEHHA would use such information to inform the content it develops for the website. OEHHA staff will review the content submitted prior to publication on the website. OEHHA has also included a disclaimer of information from third parties under subsection (a)(6). If a person believes information posted is inaccurate they may request a correction pursuant to subsection (a)(5).

19. **Comment (CHPA):** OEHHA has not provided details on how it will provide information to the public regarding chemicals that were listed exclusively based on animal data and/or chemical structure function relationships.

Response: This comment is outside the scope of this regulatory action. The information on the basis for the listing of a chemical will continue to be available on the main OEHHA website. The warning website is intended to provide information to the public primarily about warnings, how people may be exposed to listed chemicals from products or locations for which warnings are commonly provided, and how people may be able to reduce or avoid exposures to listed chemicals.

20. **Comment (CHPA):** Several terms within the proposed regulation remain vague, such as in subsection (a)(6), “reasonably available information concerning the anticipated level of human exposure to the listed chemical.”

Response: The phrase “anticipated level of” [human exposure] was stricken from the proposed regulatory text in the August 2015 modification of text. Additionally, based on stakeholder concern regarding the scope of the information requested under subsection (b), the regulation has been modified by the addition of subsection (c) that provides a business is not required to perform any new or additional testing or analysis for the purpose of responding to a request from the lead agency. Further, the amended text expressly provides that if the requested information is not in the possession or control of a business, the business is not required to procure it the purpose of providing the information to the lead agency.

21. **Comment (CHPA):** Because OEHHA has not explained how the process may work, companies will have to continually monitor the website to ensure that no erroneous, false or misleading "reasonably available" information is incorporated onto the website.

Response: A company's decision to "continually monitor" the OEHHA website and the allocation of its resources is within individual businesses' discretion; however, OEHHA recognizes the importance of providing accurate information on the website. Under subsection (a)(5) a business will have the opportunity to request a correction of material provided on the website. Additionally, OEHHA will provide a disclaimer as to the accuracy of information provided by third parties and provide a "contact us" feature to facilitate communication with the OEHHA staff regarding content, along with the ability to join a "listserv" in order to be notified of changes to the website.

22. **Comment (NMMA):** NMMA is concerned about the lack of an established protocol in the website disclosure process. OEHHA may request product information from various different sources with no clearly defined chain of command. This lack of protocol adds unnecessary confusion for businesses.

Response: The types of information OEHHA intends to include on the website are set out in Section 25205(a). The "chain of command" discussed by the commenter appears to refer to a tiered approach to responsibility to provide information requested by OEHHA. OEHHA has determined that a tiered system of responsibility to provide information is unnecessary in light of subsection (c) which provides that a business is not required to provide information requested by OEHHA if the business does not possess or control the information. Further, the regulation explicitly states that a business is not required to perform new or additional testing for the purpose of responding to a request under this section. Finally, subsection (d) allows responses from trade organizations when two or more businesses are asked for the same information from OEHHA.

23. **Comment (RMA):** RMA supports the inclusion of a process to request a correction of material provided to the website.

Response: Comment noted, no response to this comment is required.

24. **Comment (RMA):** Section 25205(a)(2) provides the opportunity to correct information on the lead agency website, however it does not specify that OEHHA will remove inaccurate information. RMA recommends that Section 25205(a)(2) be revised to specify that if a request is made to correct information on the website, which is substantiated with information showing why the material is inaccurate, OEHHA should remove the information from the website.

Response: OEHHA intends to ensure the accuracy of the information it provides on its website to the greatest extent possible, consistent with its mission to protect public health and the environment. OEHHA anticipates that most information provided on the

website will be obtained from authoritative agencies and will be compiled and reviewed by OEHHA scientific and legal staff. OEHHA will review information submitted by third parties, and will implement a process for review of and removal of alleged inaccurate information. Additionally, OEHHA has included a disclaimer in subsection (a)(6) regarding the accuracy of information provided by third parties. In terms of procedures for submission of contextual information, manufacturers and other interested parties may submit information directly OEHHA to be considered for publication on the website. The website is currently in development and will include a "contact us" feature to allow for such comments. OEHHA retains its discretion concerning the content that may be posted on the website and will not automatically post material received from third parties. Part of the process for correcting potentially inaccurate information would necessarily include it being removed from the website.

25. **Comment (Wine et al.):** By providing strategies for reducing exposure and assisting individuals to obtain additional information regarding nutritional benefits, health concerns, etc., OEHHA would be put in the position of providing medical advice.

Response: OEHHA respectfully disagrees with the commenter's characterization of providing links to public information provided by authoritative entities as providing medical advice. OEHHA routinely posts public health related information on its existing website without triggering such concerns.

26. **Comment (WSPA):** OEHHA should clearly indicate why the information being requested is essential to developing a State-run website.

Response: OEHHA intends to ensure the accuracy of the information it provides on its website to the greatest extent possible, consistent with its mission to protect public health and the environment. OEHHA anticipates that most information provided on the website will be obtained from authoritative agencies and will be compiled and reviewed by OEHHA scientific and legal staff. Much of the information that will be included is publicly available or will be obtained by OEHHA. However, in some situations it may not be possible for OEHHA to locate information about a particular exposure from public sources. For example, it may not be clear from a Proposition 65 warning where a listed chemical is located in a product with multiple components, and how individuals could be exposed to the chemical. In those situations, OEHHA has the option under proposed Section 25205(b) to request certain information from the businesses that are providing warnings, to the extent the information is available and not subject to privilege. OEHHA would use such information to inform the content it develops for the website. It is possible that some information received from the business community may be incorporated into fact sheets or other materials that will be made available to the public on the website. OEHHA has no plans to post materials received from businesses under subsection (b) directly to the website. OEHHA will review information submitted by third parties, and will implement a process for review of and removal of alleged inaccurate

information. Additionally, OEHHA has included a disclaimer in subsection (a)(6) regarding the accuracy of information provided by third parties.

B. Section 25205(b)

27. **Comment (ACA, AHPA):** The ISOR states that a business will not be expected to obtain or develop new data in order to respond to a request for data under Section 25205(b). However it is not explicitly included in the regulatory language itself, which merely states that the information must be provided "when reasonably available." ACA and AHPA recommend OEHHA include this language in the actual text of the regulations to give businesses certainty that information requests under Section 25205(b) do not confer any additional testing obligations.

Response: In response to the request for express language in the regulation, OEHHA modified the regulatory language to provide that a business is not required to perform any new or additional testing or analysis for the purpose of responding to a request from the lead agency. The amended text additionally provides that if the requested information is not in the possession or control of a business, the business is not required to procure it for the purpose of providing the information to the lead agency.

28. **Comment (ACA):** Because OEHHA seeks to list all chemicals in a product for which a warning is provided, companies will either have to perform exposure assessment or cite chemicals that pose no risk to the user of the product. In addition, because OEHHA does not expect a significant economic impact on businesses required to report information, OEHHA could simply provide a de minimis disclosure level, such as above 0.1% concentration, for the website.

Response: This regulatory proposal does not require OEHHA to provide the names of all chemicals for which a warning is provided for an individual product. Additionally, the regulation has been modified to provide that a business is not required to perform any new or additional testing or analysis for the purpose of responding to a request from the lead agency. The amended text also provides that if the requested information is not in the possession or control of a business, the business is not required to procure it for the purpose of providing the information to the lead agency, thus the potential costs of the regulation to businesses is negligible.

29. **Comment (ACA):** OEHHA has stated in Section 25205(b)(7) that the information only needs to be provided if it is known. ACA requests that this qualification be provided to subsection (6). Further, subsection (9) should be combined with subsection (8) to allow manufacturers to provide appropriate exposure information if it is known.

Response: OEHHA has considered this comment and has decided not to make the requested change as it is unnecessary in light of the addition of subsection

(c), which provides that a business is not required to perform any new or additional testing or analysis for the purpose of responding to a request from OEHHA. In addition, the regulatory text was amended so that if the requested information is not in the possession or control of a business, the business is not required to procure it for the purpose of providing the information to OEHHA. These changes adequately address this comment.

30. **Comment (ACA):** ACA suggests that OEHHA specify a timeframe as well as clearly establish the narrow parameters in terms of information OEHHA can request from manufacturers. ACA suggest that a reasonable timeframe would be six months or more.

Response: OEHHA has considered this comment and has determined that 90 days is sufficient time to respond to a request for reasonably available information in the possession or control of the business that does not require additional testing or analysis. Further, in response to this and other comments regarding the scope of the information OEHHA may request from businesses, subsection (b)(10) was modified to limit information requested to that concerning exposures to listed chemicals for which warnings are being provided under Health and Safety Code Section 25249.6.

31. **Comment (ACA):** Currently, Section 25205(b)(10) states that OEHHA may request "any other information the Lead Agency deems necessary for the furtherance of this section." In order to put reasonable limits in the regulations and safeguards for businesses mandated to provide OEHHA with data, ACA suggests omitting the phrase "that the lead agency deems necessary".

Response: In response to this and other comments concerning the scope of the regulation, the phrase "that the lead agency deems necessary" has been stricken in the proposed language of the modified regulatory text and the scope of the information OEHHA may request from businesses in subsection (b)(10) was modified to limit it to information about exposures to listed chemicals for which warnings are being provided under Health and Safety Code Section 25249.6.

32. **Comment (AHPA):** AHPA is concerned that the introductory sentence of proposed Section 25205(b) lacks clarity. In the initial sentence it is unclear whether the phrase "that is providing a warning" applies only to "a particular business" or also applies to "[t]he manufacturer, producer, distributor, or importer of a product."

Response: OEHHA disagrees with the characterization of this section as lacking clarity. The phrase "that is providing a warning" applies to the business or businesses that receive a request from OEHHA, which could include the manufacturer, producer, distributor, importer and/or any other business that may be providing the warning.

33. **Comment (AHPA):** The phrase "when reasonably available" is ambiguous. AHPA instead recommends that the requested information be provided if the business knows of the information at the time the request is made.

Response: OEHHA has considered this comment and has decided not to make the requested change as it is unnecessary in light of the addition of subsection (c), which provides that a business is not required to perform any new or additional testing or analysis for the purpose of responding to a request from OEHHA. In addition, requested information that is not in the possession or control of the business is not required to be procured for the purpose of providing it to OEHHA.

34. **Comment (AHPA):** It is inappropriate and unnecessary to include "importer" in Section 25205(b).

Response: The term "importer" is included because an importer is an entity that may be subject to the requirements of Proposition 65's warning provisions if they cause an exposure to a listed chemical in California and may, therefore, be the entity that is providing a warning for a particular chemical exposure.

35. **Comment (AHPA):** The list of data requested in subsection (b) "is quite long and, even so, remains open-ended (paragraph (10) includes "[a]ny other related information that the lead agency deems necessary")" and may make gathering the requested information onerous.

Response: This comment was addressed by changes made to the regulation that only require information to be provided when reasonably available. Further, new subsection (c) provides that a business is not required to perform any new or additional testing or analysis for the purpose of responding to a request from OEHHA. In addition, requested information that is not in the possession or control of the business is not required to be procured for the purpose of providing it to OEHHA.

36. **Comment (AHPA):** The commenter states that several of the items in the list will often be unknown to the firm that receives OEHHA's request for information. To ensure clarity, AHPA requests that paragraphs (2), (5) through (7), (9), and (10) be amended to include "if known" at the end of each item.

Response: OEHHA has considered this comment and has decided not to make the requested changes as it is unnecessary in light of the addition of subsection (c), which provides that a business is not required to perform any new or additional testing or analysis for the purpose of responding to a request from OEHHA. In addition, requested information that is not in the possession or control of the business is not required to be procured for the purpose of providing it to OEHHA.

37. **Comment (AHPA):** The commenter states that in subsection (b), subparagraphs (5), (6), and (7) are unclear, and strongly encourages OEHHA to clarify the precise meanings of paragraphs (5), (6), and (7) to ensure the regulatory language in each paragraph accurately reflects the intended meaning.

Response: OEHHA disagrees with the characterization of the items requested as being unclear. Each item listed is distinct with a different data objective. Subsection (b)(5) requires the business to provide information concerning the location of the chemical or chemicals in the product. As an example, if a warning for lead is being provided on a garden hose, a consumer may want to know whether the listed chemical is in the brass fitting or in the plastic hose. Subsection (b)(6) focuses on the possible range of concentrations of a listed chemical in the final product. OEHHA may request information regarding the individual components rather than the total final product. For example, if there is lead in the hose, OEHHA may inquire as to the concentration of lead in the hose itself as compared to the nozzle. Subsection (b)(7) focuses on the matrix, and the concentration in the product matrix. A component may include multiple matrices and OEHHA may request information on the level of the chemical in the matrix of the component. An example would be carpet tile with listed chemicals only in the secondary backing layer. OEHHA may request information regarding the concentration in the matrix, or in this example, the secondary backing layer.

38. **Comment (AHPA):** The manner by which information is collected will not be representative of the full range of products in the marketplace resulting in biasing the sample towards products that cause higher exposures. The inherent bias in the data collected would be rectified by including a broad range of companies in the information request.

Response: OEHHA anticipates that most information provided for the website will be obtained from authoritative agencies and interested and affected third parties, including trade organizations that may provide aggregated information based on product categories. OEHHA scientific and legal staff will consider and review all information provided. The requirement to provide requested information applies to those businesses that are providing a warning pursuant to Health and Safety Code Section 25249.6 and does not extend to businesses that are not providing warnings.

39. **Comment (AHPA):** OEHHA should undertake anonymous, voluntary surveys of entire product sectors, rather than singling out the “occasional” private entity for data requests. Also, OEHHA should engage a consumer-oriented market research firm to aid in the design of the web portal and the language it will use.

Response: The comment contains suggestions for OEHHA in setting up and operating the website, rather than comments on specific provisions of the regulation. OEHHA anticipates that most information provided on the website will be obtained from authoritative agencies and will be compiled and reviewed by OEHHA scientific and legal staff. Much of the information that will be included is publicly available or will be obtained by OEHHA. However, in some situations it may not be possible for OEHHA to locate information about a particular exposure from public sources. In those situations, OEHHA has the option under proposed Section 25205(b), to request certain information from the businesses that are providing warnings, to the extent the information is available and not subject to privilege. OEHHA would use such information to inform the content it develops for the website. In response to stakeholder comments, subsection (d) of the proposed regulation allows businesses to respond to a request for information through their trade organization when the lead agency requests information under subsection (b) from two or more businesses regarding the same product or exposure. This is intended to allow for more flexibility for businesses providing requested information to OEHHA.

40. **Comment (AAMGA):** The website could help consumers make educated decisions about products or environments that could cause exposure to Prop 65 listed chemicals.

Response: Comment noted, this comment does not require a response.

41. **Comment (AAMGA):** In the ISOR OEHHA states it intends to “collect publicly existing, publicly available information.” However, OEHHA does not make this intent clear in the regulation itself. OEHHA states that information must be provided “when reasonably available.” The rule should specify that information not currently available may be provided, but is not required to be submitted. Following the request for information from OEHHA, the business would provide the information if it knows or is in possession of the information.

Response: In consideration of this comment and similar comments, OEHHA has added subsection (c), which provides that a business is not required to perform any new or additional testing or analysis for the purpose of responding to a request from OEHHA. In addition, requested information that is not in the possession or control of the business is not required to be procured for the purpose of providing it to OEHHA.

42. **Comment (AAMGA):** Original equipment manufacturers (OEMs) and suppliers may be under confidentiality agreements that generally prevent them from sharing information. The entity responding to an OEHHA request should be the entity that is in the best position to know whether the requested information contains trade secrets or confidential business information whose disclosure could affect competition in the marketplace.

Response: The requirement to provide requested information applies to those businesses that are providing a warning pursuant to Health and Safety Code Section 25249.6. Subsection (e) provides that a business may identify information as a trade secret. If OEHHA determines the information identified as trade secret must be disclosed under the Public Records Act or other law, OEHHA will notify the business and provide an opportunity to submit additional justification for the claim of nondisclosure. Further, information subject to other privileges is excluded under subsection (f).

43. **Comment (AAMGA):** The phrase, "within the timeframe specified in the request" is extremely vague. The time to submit information to OEHHA should be no less than 6 months from the receipt of the request.

Response: OEHHA has considered this comment and has stricken the phrase "within the timeframe specified in the request" in the text modified in August 2015. OEHHA has additionally determined that 90 days is sufficient time to respond to a request for reasonably available information, in the possession or control of the business that does not require additional testing or analysis.

44. **Comment (FPPI):** The information being sought for web reporting is duplicative and redundant with the existing product label.

Response: The information requested is related to exposures to listed chemicals and it is unlikely that the information will be duplicative. Most warnings will not contain the level of detail specified in the regulation. In the event they do, OEHHA will not need to request the information from the business providing the warning.

45. **Comment (FPPI):** The information being sought requires substantial industry resources while providing no tangible benefit to consumers.

Response: OEHHA disagrees with the assertion that the information that may be requested by OEHHA provides no tangible benefit to consumers. Providing information to the people of the State of California regarding exposures to listed chemicals benefits the health and well-being of consumers and furthers the purposes of the Act.

It is true that a business may be required to respond to OEHHA requests for reasonably available information; however, OEHHA has made significant changes throughout the regulation based on stakeholder comments such as limiting the scope of information to be requested by OEHHA and allowing for submission of information through trade groups that render the cost of complying with such a request negligible.

46. **Comment (FPPI):** The information being sought encourages opportunistic lawyer-driven frivolous lawsuits.

Response: OEHHA disagrees with the comment. The regulation was specifically removed from the Article 6, Clear and Reasonable Warnings proposed regulatory action to address stakeholder concerns that private plaintiffs would use information from the website as the basis for litigation alleging a failure to provide a warning under the Act. The information OEHHA plans to provide on the website will focus on general public information about exposures where warnings are being provided and OEHHA does not anticipate that the information posted on the website will be product specific. Since most of the information that will be provided is already publicly available, OEHHA does not anticipate any significant increase in litigation related to this regulation.

47. **Comment (FPPI)**: It is not readily apparent how consumers would use the mean, minimum, and maximum concentrations of a chemical or chemicals for the final product to determine the level of chemical presence. Under Title 27, California Code of Regulations, section 25821(c)(2), the level of exposure shall be calculated using the reasonably anticipated rate of intake or exposure for average users of the consumer product. The provision of three different concentrations, instead of just the average, will likely confuse consumers. Further, consumers likely will not understand the distribution of concentrations across the range provided. This may lead to unnecessary alarm based on reported maximum concentration levels even though most products are not likely to result in exposures at maximum levels. This concern is especially true for substances subject to Prop 65 based on chronic exposure, for which one-off exposures at the listed maximum likely would not materially affect potential risks.

Response: The information that may be requested by OEHHA from a product manufacturer, producer, distributor, or importer under this section is intended to allow OEHHA to better understand an exposure for which a warning is being provided. The information concerning the concentration of the chemical in a given product is useful in evaluating the potential level of exposure and will assist OEHHA in developing information for the website. It may also allow OEHHA to provide compliance assistance to businesses that may be providing a warning when an exposure may be so low a warning is not actually required. Information received under this section will not generally be posted verbatim on the website. The section of the regulations cited in the comment concerning methods for evaluating exposures is not directly relevant to this rulemaking. No change to the regulation was made based on this comment**.**

48. **Comment (HSIA):** Information such as, “the estimated level of exposure to a chemical” (subsection (b)(9)) of a household product may not be readily available. In addition, “there are as many exposure scenarios as there are uses of the product,

making the collection and posting of such data an exercise in futility. It is also possible that erroneous exposure scenarios might be collected and posted."

Response: The amended text of subsection (c) provides that if requested information is not in the possession or control of a business, the business is not required to procure it for the purpose of providing the information to the lead agency. If potentially erroneous or incomplete information is provided on the website, a business may submit a request for a correction of the material pursuant to subsection (a)(5).

49. **Comment (HSIA):** Information regarding concentrations and locations of chemicals has the potential to put trade secrets at risk (concentrations) and to create security risks (locations), to the extent such information is made available to the public.

Response: If a person believes the information requested by OEHHA is a trade secret, under subsection (e) a business has the opportunity to request a designation of information as a trade secret that is exempt from disclosure under the Public Records Act and provisions of the Evidence Code. If a business is providing a public warning for an exposure to a listed chemical at a given location, it is very unlikely that a request for additional information from OEHHA will trigger a security risk for that business.

50. **Comment (RMA):** RMA recommends that the proposed lead agency website regulation should specify that businesses are not required to conduct new testing in response to the request for information in subsection (b) and can respond to OEHHA's request for information by stating that they do not have the information requested.

Response: The requested change has been addressed by the addition of subsection (c), which expressly provides that a business is not required to perform any new or additional testing or analysis for the purpose of responding to a request from OEHHA. In addition, requested information that is not in the possession or control of the business is not required to be procured for the purpose of providing it to OEHHA.

51. **Comment (RMA):** RMA recommends that OEHHA delete Section 25205(b)(7) from the proposed lead agency website regulation as this information is likely considered confidential business information for many products.

Response: If information requested is confidential business information, a business may request designation of the information as a trade secret pursuant to subsection (e) of the proposed regulation.

52. **Comment (RMA):** RMA recommends that OEHHA limit the scope of information that the agency can request under Section 25205(b)(10). The information should be limited "to information related to potential exposures to listed chemicals for which warnings are already being provided under the Act" as stated in the ISOR for the Lead Agency Website, Page 7 of 13.

Response: In response to stakeholder comments, subsection (b)(10) was modified to qualify the information requested to that which is related to exposures to listed chemicals for which warnings are being provided under the Act.

53. **Comment (RMA, WSPA):** OEHHA should clarify in Section 25205(b) that trade groups and other organizations are also able to provide the information requested in this section on behalf of an industry.

Response: In response to stakeholder comments, subsection (d) was added to the proposed regulation stating that businesses may respond to a request for information through their trade organization where the lead agency requests information under subsection (b) from two or more businesses regarding the same product or exposure.

54. **Comment (WSPA):** Regarding subsection 25205(b)(8), regulated businesses do not always have complete information or knowledge about all possible "anticipated routes and pathways of exposure to the listed chemical(s) for which the warning is being provided." Pathways or routes of exposure to a listed chemical typically depend on a host of factors, and could differ from individual to individual. For some products, inhalation exposure may be a "common" pathway, but for a small percentage of individuals, dermal exposures might be possible under some circumstances. Whether an infrequent or extremely uncommon exposure pathway should be "anticipated" by a regulated business is a question not answered by the regulations, leaving regulated businesses to guess what it means (e.g., whose "anticipation" is referenced here – the business', OEHHA's, the public's or someone else's?). We understand that, like with Section 25205(b)(9), OEHHA does not intend for businesses to have to conduct studies or gather research it does not already have with respect to exposure pathways. As with Section 25205(b)(9), the section should be clarified to require "common routes and pathways of exposure to the listed chemical(s) for which the warning is being provided that are known by the regulated business."

Response: OEHHA disagrees with the characterization of the term "anticipated" as being unclear in subsection (b)(9). The entity receiving a request to provide information is providing a warning under the Act because they expect or predict an exposure to a listed chemical. The term "anticipated" thus refers to that of the party providing requested information under subsection (b), i.e., the manufacturer, producer, distributor, importer, or particular business. Information regarding "common routes" of exposure may be helpful general information for the website, however, OEHHA may require more detailed information regarding exposures to listed chemicals for which the entities in subsection (b)(9) are providing warnings; these entities may be the only source for that important information that could impact the health of the people of the state of California. Additionally, if a business does not have the information requested by OEHHA in subsection (b)(9), subsection (c) makes clear that a business is not required

to perform 'any' new testing or analysis for the purpose of responding to a request from OEHHA and that information not in the possession or control of the business is not required to be procured. For these reasons, OEHHA declines to make the modification requested by the commenter.

55. **Comment (WSPA):** Although OEHHA has stated that it "will not be asking for information the business does not already have" (ISOR, p. 7), this is not currently reflected in the actual regulatory language. WSPA recommends that proposed Section 25205(b)(9) be clarified to refer to reasonably available information in the possession of the business.

Response: OEHHA has considered this comment and has added subsection (c) which provides that a business is not required to perform any new or additional testing or analysis for the purpose of responding to a request from OEHHA. In addition, requested information that is not in the possession or control of the business is not required to be procured for the purpose of providing it to OEHHA.

56. **Comment (WSPA):** As with Section 25205(b)(9), if OEHHA does not intend for businesses to have to conduct studies or gather research it does not already have with respect to exposure pathways, WSPA would recommend that subsection (b)(8) be clarified to require only the common routes and pathways that are known by the business.

Response: This comment has been addressed by the addition of subsection (c) which provides that a business is not required to perform any new or additional testing or analysis for the purpose of responding to a request from OEHHA. In addition, requested information that is not in the possession or control of the business is not required to be procured for the purpose of providing it to OEHHA.

57. **Comment (WSPA):** The phrase "[a]ny other related information that the lead agency deems necessary" in subsection (b)(10) is vague and overbroad. WSPA recommends that proposed Section 25205(b)(10) be revised to include information that is deemed necessary and which is related to the potential exposure to listed chemicals subject to the warning requirement.

Response: In response to stakeholder comments, subsection (b)(10) was modified by striking the phrase "that the lead agency deems necessary".

58. **Comment (USBM):** At the March 25, 2015 public hearing, USBM asked what is the scope of "deemed necessary" as referenced in Section 25205(b)(10)? Is the information based on an industrial standard, a consumer standard, or a government standard? How broad is it and what are the limits?

Response: The term "deems necessary" was subsequently stricken from the regulatory text to limit the information OEHHA may request to information

concerning exposures to listed chemicals for which warnings are being provided under the Act.

C. Section 25205(c)

59. **Comment (AHPA):** AHPA requests OEHHA to revise Section 25205(c) such that no data or information related to any individual brand or company will be disclosed on the web portal or elsewhere. Brand or company specific information should be considered confidential business information and not subject to public disclosure.

Response: The website is intended to provide information to the public regarding exposures to listed chemicals for which warnings are being provided. The fact that such a warning is being given to the public on a particular branded product or by a particular company cannot be considered confidential business information. Although the lead agency is not expressly precluded from requesting brand or company-specific information, the information on the OEHHA website will primarily focus on categories of products not brand-specific or company-specific information.

60. **Comment (CCC):** The proposed regulation does not specifically address work-product considerations. Instead, it creates a procedure by which businesses can designate requested information as "confidential" subject to OEHHA's review of the information and concurrence in the designation. That process is inadequate to protect work-product. Accordingly, the regulation should be revised to clearly state that work-product does not have to be provided.

Response: In response to stakeholder comments, subsection (f) was added to the proposed regulations stating that businesses are not required to provide information to OEHHA that is exempt from disclosure under the Attorney-Client or Attorney Work Product privileges of the Evidence Code or California Code of Civil Procedure.

61. **Comment (CCC):** If OEHHA determines the information that a business claims is confidential must be released to the public, the proposed 15-day response timeframe is insufficient. A reasonable lead time of at least 90 days must be provided in order to allow sufficient time for businesses to provide a reasoned and adequate response.

Response: OEHHA has considered this comment and has modified the text to allow 30 days for the lead agency to provide notice to a business if it determines such information should be disclosed. This should be sufficient time for the business to respond to support a claim of confidentiality or contest the determination of a legal proceeding. OEHHA has a legal obligation under the Public Records Act to timely produce records in its possession and control. Providing a 90-day or longer timeframe for a business to act is inconsistent with this duty.

62. **Comment (CRN):** Subsection (c) may not provide adequate protection for trade secrets and other confidential business information (CBI). The regulation appears to

provide OEHHA with sole discretion in determining whether information is CBI, with only a limited timeframe to challenge such determinations by the agency.

Response: Subsection (e) provides that a business may claim that certain information it provides to OEHHA is not subject to disclosure. If OEHHA determines the information identified as trade secret must be disclosed under the Public Records Act or other law, OEHHA will notify the business and provide an opportunity for the business to submit additional justification for the claim of nondisclosure. A business also has the option of seeking judicial action to protect the information. OEHHA has determined that 30 days is sufficient for a business to provide additional justification or initiate legal proceedings to protect the claimed trade secrets.

63. **Comment (RMA):** RMA supports the inclusion of CBI provisions in Section 25205(c) and recommends that businesses be provided at least 30 days to submit additional information to justify a CBI claim or seek judicial review of the agency's decision to disclose the information claimed as CBI.

Response: OEHHA has considered this comment and has amended the timeframe to 30 days in which a business has the opportunity to respond to support a claim of confidentiality or contest the determination in a legal proceeding.

64. **Comment (WSPA):** At the March 25, 2015 public hearing, WSPA stated that it would need no fewer than *90 days* from the Public Records Act request to provide the additional justification to support their claim. In its April 8, 2015 written comments, WSPA states that 15 days is an insufficient amount of time for a business to determine if it can maintain a legal proceeding to protect the disclosure of its information. WSPA requests that OEHHA modify subsection (c) to allow businesses to issue, within 15 days of the Public Records Act request at issue, a simple notice advising OEHHA that the business reasserts its request for nondisclosure of the confidential information, and *within 60 days* of the Public Records Act request, to provide "additional justification for the claim or to contest the determination in an appropriate proceeding."

Response: OEHHA has considered these comments and has extended the period from 15 days to 30 days. OEHHA has determined that 30 days is sufficient time to support a claim of confidentiality or issue proceedings to contest the determination in a legal proceeding. OEHHA has a legal obligation under the Public Records Act to timely produce records in its possession and control. Providing a 90-day or longer timeframe for a business to act is inconsistent with this duty.

D. Section 25205(d)

65. **Comment (AHPA):** AHPA appreciates that OEHHA has moved the proposed regulations pertaining to the website to a separate Article and that OEHHA has clarified that compliance with Article 2 is not subject to lawsuit by private party plaintiffs.

Response: Comment noted, this comment does not require a response.

66. **Comment (CAPA):** CAPA strongly supports the inclusion of subsection (d) in the website regulation.

Response: Comment noted, this comment does not require a response.

67. **Comment (CEH):** At the March 25, 2015 public hearing, CEH expressed appreciation that OEHHA made it clear in subsection (d) that the website is not a substitute for a warning.

Response: Comment noted, this comment does not require a response.

E. Economic Impact Comments

68. **Comment:** Several commenters **(AAMGA, AHAM, ASC, CCC, and CRN)** expressed concern about the economic impact associated with the creation of the lead agency website. Each of the commenters disagreed with OEHHA that there is no significant economic impact.

Response: While the regulation requires businesses to occasionally provide information regarding the warnings they are providing for listed chemicals to OEHHA upon request, this information is similar to that obtained by the business for the purpose of determining whether to provide a Proposition 65 warning. If information is requested from a business, the information is limited to that which is reasonably available, and the regulation expressly states that a business need not procure information that is not within its possession or control, or perform additional testing for the purpose of providing information in response to a request for information. OEHHA anticipates that most businesses will voluntarily provide it with information and there will seldom be a need for it to specifically request information from a given business. The more likely approach would be to request information from an entire business sector through an association, thus reducing any potential costs. Because of this, OEHHA has determined that the potential cost of the regulation is negligible.

F. Statutory Authority Comments

69. **Comment:** Several commenters **(ACA, ACC, ACC-CPM, AHPA, AHAM, CCC, CCEEB, CRN, HSIA, and RMA)** assert that OEHHA does not have the statutory authority to require businesses to provide supplemental information. Commenters suggest that OEHHA's authority is limited to regulations concerning warning labels and recommend making the submission of information to OEHHA voluntary. ACA

challenged the use of Health and Safety Code Section 25249.11 as authority in the ISOR.

Response: Proposition 65 is a right-to-know law. The lead agency has a statutory responsibility to ensure that this regulatory proposal is consistent with the purpose of the Act, namely to provide people with information concerning their *exposures* to listed chemicals. In addition, the lead agency is responsible for adopting regulations that implement the Act and "further its purposes." [6] OEHHA is implementing and furthering the purposes of the Act by collecting information relevant to those exposures and providing it to the public in a convenient location. In some cases, the persons or groups providing the warning may be the only source of certain information regarding the exposure such as the location, concentration and matrix within which the chemical occurs. This information is inextricably linked to the statutory right of the people of California to be informed about exposures to listed chemicals and OEHHA is acting in accordance with its statutory responsibility to adopt regulations to further the purposes of the Act.

The commenter correctly noted that the citation to Health and Safety Code Section 25249.11 as primary authority in the Initial Statement of Reasons was incorrect. Additionally, the proposed regulation did not cite Health and Safety Code Section 59009 to protect and preserve public health within its jurisdiction and to enforce the lead agency's rules and regulations. The authority in the proposed regulation has thus been updated to correctly refer to Health and Safety Code Sections 25249.12 and 59009. Section 25249.11 is accurately cited in the proposed regulation as a reference for the regulation, as is Section 25249.6.

G. Miscellaneous/General Comments

70. **Comment (APTCO/RIDDELL WILLIAMS):** It is difficult to understand what information businesses would need to provide if they were forced to turn over information to OEHHA. It is also not clear what information OEHHA intends to post on its website.

Response: The primary intention of the website is to provide information to the public regarding exposures to listed chemicals for which warnings are being provided. The site will primarily focus on categories of products and locations where exposures may occur. Subsections (a)(1)-(4) in the proposed regulation set out the types of information that will be provided on the website. Examples of information that OEHHA may request from a business are delineated in subsections (b)(1)-(9).

[6] Health and Safety Code section 25249.12(a); see *Environmental Law Foundation v. Wykle Research, Inc.* (2005) 134 Cal. App. 4th 60, 791.

71. **Comment: (APTCO/RIDDELL WILLIAMS):** it is difficult if not impossible to find any specific benefits to the public in OEHHA's proposals. Instead, OEHHA simply concludes throughout its Initial State of Reasons that its proposal furthers the intent of Proposition 65 by providing more useful information to the public.

Response: This comment appears to be directed at both the Article 6 Clear and Reasonable Warnings regulatory proposal as well as the Article 2 Lead Agency Website regulatory proposal. OEHHA declines to respond to comments on the Article 6 regulatory proposal because it is outside the scope of this rulemaking. In terms of the current Article 2 proposal, OEHHA included a finding in the September 4, 2014 Notice of Modification of Text addressing this issue:

"Finally, pursuant to Government Code sections 11346.5(a)(11) and 11346.3(d), a state agency may not adopt a regulation requiring a business to submit a report to the agency, unless it makes a finding that the regulation is necessary for the health, safety, or welfare of the people of the state that the regulation apply to businesses. This regulation will provide vital information to the people of California regarding exposures to listed chemicals and ways to avoid or minimize exposures. Therefore, OEHHA finds that it is necessary for the public health and safety of the people of this state that this proposed regulation which requires a report apply to businesses."

72. **Comment (ASC):** The proposed website should be dropped or at the very least make submissions to it voluntary.

Response: OEHHA has determined that a website is an effective manner of disseminating information to the public concerning exposures to listed chemicals for which warnings are being provided. The manufacturer, producer, distributor, or importer of a product, including food, or a particular business may be in the best position to provide certain information regarding the listed chemicals for which it is providing a warning pursuant to the Act. The rulemaking materials provided to the public have explained the necessity and benefits of this proposed rulemaking. OEHHA has considered the recommendation of this commenter to withdraw the website proposal and for these reasons declines to accept the recommendation. Because of the importance of the information to the health and well-being of the people of the state of California, OEHHA declines to make its requests for information voluntary. OEHHA has made several amendments to the regulation to protect trade secrets and to clarify that businesses only have to provide available information.

73. **Comment (ASC):** Giving proprietary information to the general public or competitors becomes a risk to doing business in California such that manufacturers may cease to sell certain products in California rather than disclose information that the competition can use.

Response: Subsection (e) provides for a business to designate certain information as trade secret. If OEHHA determines the information identified as trade secret must be disclosed under the Public Records Act or other law, OEHHA will notify the business and provide an opportunity for it to submit additional justification for the claim of nondisclosure or take judicial action to protect the material.

74. **Comment (ACC):** OEHHA should reconsider the need for and wisdom of a lead agency website. Consumers seeking additional information about the safety of consumer products and the chemicals in them should be referred to the product manufacturer.

Response: OEHHA respectfully disagrees with this comment. Over the last 20 years, the public has come to expect both government agencies and private businesses to make important information available about their services and products on websites. OEHHA believes that it is important for information relating to a public right-to-know law like Proposition 65 to be made available on a government website. A UC Davis Extension survey[7] commissioned earlier this year by OEHHA found that about 60 percent of more than 1,500 individuals surveyed said they would be interested in visiting the Proposition 65 website after viewing sample warnings that contained the website's address. The sample warnings were comparable to those proposed in an OEHHA regulation that would require the inclusion of the website address on all safe harbor warnings provided by businesses.[8]

The UC Davis Extension survey results are consistent with OEHHA's many years of experience in answering public inquiries about Proposition 65. Consumers very frequently contact OEHHA concerning the warnings they see on products or at locations in California, and are typically frustrated when OEHHA instructs them to contact businesses for specific information on the warnings they provide. Members of the public frequently tell OEHHA that they were unable to get warning-related information from the businesses in question, and in some cases say the business referred them to OEHHA for information on the warning. While a reluctance to provide warning-related information to the public may not necessarily be representative of most product manufacturers and other large businesses, one major product manufacturer and retailer

[7] UC Davis Extension Collaboration Center, Proposition 65 Clear and Reasonable Warning Regulations Study: Survey results assessing the effectiveness of existing and proposed Proposition 65 warning signs (2015). This document is being cited in response to the question of the commenter, but was not relied on in the development of this regulation.

[8] Title 27 California Code of Regulations Title 27, California Code of Regulations Proposed Repeal of Article 6 and Adoption of New Article 6 - Clear and Reasonable Warnings (proposed Nov. 27, 2015), available at http://www.oehha.ca.gov/prop65/CRNR_notices/WarningWeb/2NPRArticle112715.html.

– Starbucks Corporation – in recent years has included the address of OEHHA's current website on Proposition 65 warning signs posted in its California coffee shops. The UC Davis Extension survey results, along with OEHHA's experience in handling several thousand public inquiries annually on Proposition 65, indicate a clear interest by the public in a lead agency website that provides general information on warnings.

The website regulation does not preclude businesses, including product manufacturers, from providing information about the safety of their products or the chemicals in them through some other mechanism in addition to the warnings required under Section 25249.6 of the Act.

75. **Comment (ACC):** The website is duplicative and unnecessary when there are other sources of information that are widely available. It may conflict with California's Safer Consumer Products Program.

Response: OEHHA disagrees with the characterization of the commenter that the website is duplicative and unnecessary. The website will be specifically focused on Proposition 65 warnings and the information provided on the website will be provided in a centralized location so that a person seeking information related to exposure to a listed chemical can readily obtain such information. The comment is vague as to potential conflicts with the Safer Consumer Products Program, however, it should be noted that these programs are based on distinctly different statutory authority.

76. **Comment (ACC):** Consumers need product-based, complete, contextual information so they can understand product safety, benefits, risks, and safe use. If OEHHA cannot offer information about specific product use or safety, and cannot offer information about risk due to statutory limitations, it should leave these communications to others.

Response: OEHHA welcomes the voluntary submission of information regarding exposures to listed chemicals. Because of the vagueness in the comment regarding risks due to statutory limitations, OEHHA is unable to respond to this portion of the comment.

77. **Comment (ACC-CPM):** To the extent that OEHHA is not authorized to deliver contextual, risk-based information or require its delivery, it should not impede manufacturers from doing so.

Response: The regulation does not prohibit manufacturers from providing contextual, risk-based information about their products. Manufacturers are free to provide supplemental information about their products. The website is intended to be a means of providing supplemental information to help individuals make more informed decisions about exposures to listed chemicals requiring a warning.

78. **Comment (ACC-CPM):** The website focuses on single, discrete chemicals instead of on the often highly complex compounds and formulations that are consumer products. This is not how consumers should make decisions to use or consume products.

Response: The intent of the regulation is to provide information regarding exposure to listed chemicals where warnings are being provided for those exposures. The relevant consideration is *exposure to a listed chemical*, not the complexity of the compound or formulation of a consumer product. Providing such information is fully consistent with the purposes of Proposition 65.

79. **Comment (ACC-CPM):** The best place to start for useful information about the safety and safe use of consumer products is generally with the manufacturer. It would be most prudent for OEHHA to refer those with questions about consumer products to the manufacturers of the consumer products themselves for complete and accurate information.

Response: The regulation does not prohibit manufacturers from providing contextual, risk-based information about their products. Manufacturers are free to provide supplemental information about their products. The website is intended to be a means of providing supplemental information to help individuals make more informed decisions about exposures to listed chemicals for which they are receiving a warning.

80. **Comment (ACA):** At the March 25, 2015 public hearing, ACA expressed appreciation that the website regulation was separated out from the Article 6 warning regulations.

Response: This comment does not require a response.

81. **Comment (ACA):** Website could become a database of information on potential targets for Prop 65 lawsuits by comparing the information published on the website with the products in commerce.

Response: OEHHA disagrees with the comment. The regulation was specifically removed from the Article 6 Clear and Reasonable Warnings section of the regulations based on stakeholder concern over litigation alleging a failure to provide a warning under the Act. OEHHA's website will provide general information to the public about exposures where warnings are being provided. OEHHA anticipates that the information posted on the website will generally focus on general categories of products and will not be product specific. OEHHA does not expect that there will be opportunities for new litigation based on the regulation or materials posted on the website.

82. **Comment (AHPA, AWC):** The content of each webpage in the web portal should be published for comment prior to being finalized and made available to the general public.

Response: The comment provided no legal authority for the concept that information published by a public entity must be vetted through private parties or groups. Furthermore, the routine submittal of website information for review by stakeholders prior to posting would likely create a public perception that the website is not a credible source of unbiased information. OEHHA intends to ensure the accuracy of the information it provides on its website to the greatest extent possible, consistent with its mission to protect public health and the environment. OEHHA anticipates that most information provided on the website will be obtained from authoritative agencies and will be compiled and reviewed by OEHHA scientific and legal staff. OEHHA will review information submitted by third parties, and will implement a process for review of and removal of alleged inaccurate information.

83. **Comment (AWC):** OEHHA would be able to unilaterally change the content of the www.P65Warnings.ca.gov/product website, which would mean that a manufacturer would be providing a warning without knowing what that warning will convey once the product reaches the purchaser or potential purchaser.

Response: OEHHA expects the website will focus on providing general information on Proposition 65 warnings typically associated with general categories of products, rather than product-specific information. Subsection (g) of the regulation specifically says that the website information is separate from the product-specific clear and reasonable warning that businesses provide pursuant to the Proposition 65 statute. The comment provided no legal authority for the concept that information published by a public entity must be vetted through private parties or groups. OEHHA intends to ensure the accuracy of the information it provides on its website to the greatest extent possible, consistent with its mission to protect public health and the environment. OEHHA anticipates that most information provided on the website will be obtained from authoritative agencies and will be compiled and reviewed by OEHHA scientific and legal staff. OEHHA will review information submitted by third parties, and will implement a process for review of and removal of alleged inaccurate information. Additionally, OEHHA has included a disclaimer in subsection (a)(6) regarding the accuracy of information provided by third parties. In terms of procedures for submission of contextual information, manufacturers and other interested parties may submit information directly OEHHA to be considered for publication on the website. The website is currently in development and will include a “contact us” feature to allow for such comments. OEHHA retains its discretion concerning the content that may be posted on the website and will not automatically post material received from third parties.

84. **Comment (AWC):** The OEHHA website should reflect the most current and best available science on the listed substance.

Response: This comment is outside the scope of this rulemaking. The basis for listing the chemicals is already available on the existing OEHHA Proposition 65 website. OEHHA will leverage existing publicly available information on listed chemicals to the extent it is appropriate.

85. **Comment (AWC):** AWC discussed the rare tumor type associated with wood dust, highlighting the rarity of the disease through low incidence rates. AWC believes these facts should be noted in the informational website, along with other relevant information including cohort study results.

Response: OEHHA will consider including information submitted by businesses and others for inclusion on the website and encourages the commenter to submit any information it wishes to be considered as OEHHA develops content for the website.

86. **Comment (AHAM):** At the March 25, 2015 public hearing, AHAM expressed appreciation that the website regulation was taken out on its own. It reduces the litigation potential, but does not eliminate it.

Response: This comment does not require a response.

87. **Comment (AHAM):** The website fails to advance the purposes of the Act because the information is unlikely to be useful to consumers. The regulatory proposal does not address the absence of risk prioritization and would not assist citizens with making evidence-based, risk reduction decisions.

Response: OEHHA disagrees with the sweeping characterization of all information that may be published on the website as not being useful to consumers. The information provided will assist persons exposed to listed chemicals to make informed decisions regarding how and whether to minimize exposures to those listed chemicals.

88. **Comment (AHAM):** The proposed website does not answer several questions about how private plaintiffs would use the website information in lawsuits brought under other common law causes of action.

Response: OEHHA disagrees with the comment. The regulation was specifically removed from the Article 6 Clear and Reasonable Warnings proposed regulatory action based on stakeholder concern over litigation alleging a failure to provide a warning under the Act. The information OEHHA will provide on the website will focus on general public information about exposures where warnings are being provided and OEHHA does not anticipate that the information posted on the website will be product specific. Nor does OEHHA expect that there will be opportunities for new litigation based on the regulation or materials posted on the website.

89. **Comment (AXIALL):** Axiall believes consumers should be directed to the manufacturer for further information or questions regarding the safe use of their product.

Manufacturers are more familiar with their product ingredients and known risk information at various exposures levels.

Response: The regulation does not prohibit manufacturers from providing contextual, risk-based information about their products. Manufacturers are free to provide supplemental information about their products. The website is intended to be a means of providing supplemental information to help individuals make more informed decisions about exposures to listed chemicals for which they are receiving a warning.

90. **Comment (CAPA):** CAPA endorses OEHHA's decision to divorce Section 25205, the website regulation, from the clear and reasonable warning regulation. Linking the two regulations would generate a never-ending stream of lawsuits.

Response: This comment does not require a response.

91. **Comment (CCC):** At the March 25, 2015 public hearing, CCC commented that OEHHA's decision to create a stand-alone regulation for the website was very much welcomed and appreciated.

Response: This comment does not require a response.

92. **Comment (CCC): "**OEHHA intends to "collect existing, publicly available information and make it accessible to those who may have questions when they see a Proposition 65 warning." (Website ISOR, at p. 3.) Yet, the ISOR later states that the information OEHHA seeks to collect from businesses is "not always publicly available." (Website ISOR, at p.6.)" The contradiction must be resolved.

Response: OEHHA does not see a contradiction between the two statements. OEHHA anticipates that most of the information published on the website will be obtained by OEHHA staff from public sources. At times, however, the information needed to understand a Proposition 65 warning and how to reduce or avoid exposures to listed chemicals may not be publicly available. For example, in the case of a complex product with multiple components, the location of listed chemicals in the product and how individuals can be exposed to the chemicals may not be publicly available. As a business is often the best source for information regarding exposures to listed chemicals for which it is providing a warning, this underscores the necessity for subsection (b) under which OEHHA may request information that is *reasonably available* to a business concerning such exposures to listed chemicals. If the same information regarding the listed exposure is requested from two or more businesses, the businesses may respond to the request through a trade association pursuant to subsection (d). Additionally, the regulation contains several limitations on the information a business will be required to provide. Under subsection (c), a business is not required to perform additional testing in response to a request for information, and the information requested must be in the possession or control of the business. The regulation also provides protections against disclosure of trade secrets under

subsection (e), and information that is protected under provisions of the Evidence Code and Code of Civil Procedure need not be provided pursuant to subsection (f).

93. **Comment (CCEEB):** The website will not assist consumers as intended, but rather become a detailed roadmap for new litigation by enterprising plaintiffs' attorneys.

Response: The Lead Agency Website proposal was intentionally removed from the Clear and Reasonable Warnings regulatory proposal based on stakeholder comments that litigation for failing to warn under the Act could arise from a business failing to comply with the provisions of the Lead Agency Website regulation. OEHHA respectfully disagrees with the commenter's contention that the website will not be helpful to consumers. The response to Comment 74 discusses reasons why OEHHA believes there is interest by the public in using a lead agency website.

94. **Comment (CHPA):** CHPA appreciates that OEHHA separated the proposed website regulation from the clear and reasonable warning regulation.

Response: This comment does not require a response.

95. **Comment (CHPA):** It is unclear what type of information OEHHA will collect from manufacturers, how the website will be developed and structured to ensure greater consumer awareness of exposures and potential means of avoiding exposures, as well as to what extent any included information will be reviewed prior to inclusion on the website.

Response: Subsection (b) of the regulation specifies the kinds of information that OEHHA may request from manufacturers. OEHHA intends to ensure the accuracy of the information it provides on its website to the greatest extent possible, consistent with its mission to protect public health and the environment. OEHHA anticipates that most information provided on the website will be obtained from authoritative agencies and will be compiled and reviewed by OEHHA scientific and legal staff. OEHHA will review information submitted by third parties, and will implement a process for review of and removal of alleged inaccurate information. Additionally, OEHHA has included a disclaimer in subsection (a)(6) regarding the accuracy of information provided by third parties. In terms of procedures for submission of contextual information, manufacturers and other interested parties may submit information directly OEHHA to be considered for publication on the website. The website is currently in development and will include a "contact us" feature to allow for such comments. OEHHA retains its discretion concerning the content that may be posted on the website and will not automatically post material received from third parties.

96. **Comment (CHPA):** The beneficial consequences of posting any supplemental information remain unclear. It would be helpful to provide an example of how the website for a particular chemical will be structured in order that stakeholders may provide more meaningful comments.

Response: A survey of more than 1500 individuals conducted earlier this year for OEHHA by UC Davis Extension found that a clear majority of those surveyed said they would be interested in visiting a government website containing supplemental information on Proposition 65 warnings.[9] Since they first began appearing in 1988, Proposition 65 warnings have been roundly and routinely criticized by the public and business groups alike for being vague and uninformative. In light of the development of the Internet over the last 25 years, OEHHA believes a lead agency website is a prudent, common sense approach for providing the public with information about the warnings they see on products or at locations in California. OEHHA currently attempts to provide information to individuals who request it but OEHHA believes that providing the information on the Internet is a better approach that is consistent with the common use of websites to access information. OEHHA anticipates that the new website will be available to the public by mid-2016 and will consider input on its content as it is developed.

97. **Comment (CHPA):** Although OEHHA has provided a process to allow requests for a correction of information posted on the website it is unclear what approach will be used to determine what information is ultimately included on the website.

Response: OEHHA has set out in subsection (a) the types of information that may be included on the website. Most of this information is currently publicly available and will simply be consolidated there. OEHHA is a public health agency and has the general authority and expertise to provide health-related information to the public on its website. Further, OEHHA is the lead agency for implementation of Proposition 65 and believes that providing information on the website furthers the purposes of the Act by giving information to the public about exposures to chemicals listed under Proposition 65 for which they are receiving a warning.

98. **Comment (CRN):** CRN asks OEHHA to reconsider its approach and pursue only those regulatory changes that are clearly grounded in sound science and fact-based evidence. OEHHA should also focus its efforts on the most litigated areas of Prop 65: when to provide a warning, and how to determine and calculate exposure to listed chemicals.

Response: This comment is outside the scope of this rulemaking and no response is required. However, OEHHA notes that a recent UC Davis Extension survey of more than 1500 individuals conducted for OEHHA found that a clear majority of those surveyed were interested in visiting a government website containing supplemental

[9] UC Davis Extension Collaboration Center, Proposition 65 Clear and Reasonable Warning Regulations Study: Survey results assessing the effectiveness of existing and proposed Proposition 65 warning signs (2015).

information on Proposition 65 warnings.[10] OEHHA commissioned the survey in part to gather fact-based evidence on potential public interest in a lead agency website.

99. **Comment (CRN):** CRN also urges OEHHA to clarify the naturally occurring exception and expand its applicability.

Response: This comment is outside the scope of this rulemaking and no response is required.

100. **Comment (ILMA, WSDO):** The website is an unnecessary additional burden upon industry, and it would not serve as a valuable informational resource for employees given that MSDSs or SDSs already contain that information.

Response: The website may well point people to a Safety Data Sheet (SDS) for some types of occupational exposures to certain chemicals, but Proposition 65 covers far more types of exposures including exposures through foods, consumer products or environmental exposures for which an SDS would not be sufficient. The website's focus is providing information to the general public and is not intended to compete with SDSs and other chemical information that businesses provide to their employees.

101. **Comment (NMMA):** The website will fail to achieve OEHHA's intended goal of educating the public. The chemical names and health effects expected to be documented online are technical and complex. This information will be of little use to the average consumer, and will not provide more awareness or clarity on the chemicals' potential effects. There is no evidence to support any demand amongst the public for access to additional information, or studies showing that the public would even use this additional information.

Response: OEHHA disagrees with this comment. The website is intended for the general public and will not contain highly technical information. OEHHA's current website will continue to have scientific information on chemicals and evidence of their carcinogenicity and reproductive toxicity for those interested in it. The information provided on the new website will assist persons receiving warnings about exposures to listed chemicals to make informed decisions regarding how and whether to minimize exposures to those listed chemicals.

As part of its proposal to adopt a new Article 6 Clear and Reasonable Warning regulation, OEHHA commissioned a study by researchers at the University of California Davis Extension Collaboration Center to assess the effectiveness of the current and

[10] UC Davis Extension Collaboration Center, Proposition 65 Clear and Reasonable Warning Regulations Study: Survey results assessing the effectiveness of existing and proposed Proposition 65 warning signs (2015).

proposed warnings.[11] When participants were asked how likely they would visit the Proposition 65 website if they wanted additional information, over half of the respondents said that they are "very likely" or "somewhat likely" to visit the website.[12] This clearly supports the concept that many people would likely find the information on a new OEHHA website useful.

102. **Comment (PRR):** PRR supports removing the proposed requirement to submit information on all posted warnings to OEHHA for publication on its website. The amount of very technical information being provided to the public would be confusing. PRR is also concerned about ensuring the accuracy of the information that is submitted to OEHHA.

Response: The requirement for all businesses to provide OEHHA with specified information on their warnings was contained in a 2014 pre-regulatory proposal, and was not included in the official proposed regulation. Subsection (b) of the regulation requires businesses to provide OEHHA with specified information on their warnings only when requested by OEHHA, and only when the requested information is reasonably available. OEHHA does not intend to put highly technical information on the website, and disagrees that the information it will provide on its website will be confusing. The information provided will assist persons exposed to listed chemicals to make informed decisions regarding how and whether to minimize exposures to those listed chemicals. If a person questions the accuracy of information posted to the website, he or she can submit a request for a correction of the material pursuant to subsection (a)(5) or provide additional information for OEHHA to use on the website as appropriate.

103. **Comment (Sashco):** Sashco is opposed to the requirement of updating and maintaining yet another website, as it does little to simplify the flow of information, let alone provide accurate, scientific-based information. Perhaps an aggregated website would be more prudent, for example, consumers would go to the OEHHA website, and access the manufacturer's website via a link.

Response: OEHHA disagrees with the comment. Proposition 65 information on OEHHA's current website is mostly intended for scientists, attorneys and stakeholders with a professional interest in Proposition 65. Very little information on the current website is intended to inform the general public about listed chemicals and warnings. Warning-specific information will be easier for the public to access on a stand-alone website and is one of the reasons OEHHA is including specific URLs for the stand-alone website on the proposed new safe harbor warnings.

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[11] UC Davis Extension Collaboration Center, Proposition 65 Clear and Reasonable Warning Regulations Study: Survey results assessing the effectiveness of existing and proposed Proposition 65 warning signs (2015).
[12] Id. at 45.

104. **Comment (USBM):** At the March 25, 2015 public hearing, USBM expressed appreciation for OEHHA's efforts and for being candid.

Response: This comment does not require a response**.**

105. **Comment (Wine et al.):** Although OEHHA characterizes the furnishing of information for its website as "voluntary and upon request," it will be viewed as mandatory and result in a myriad of "scientific" reports and information that may be inconsistent or conflict with the body of scientific literature.

Response: OEHHA encourages businesses and other stakeholders to voluntarily provide information to OEHHA for potential inclusion on the website. In the event OEHHA needs information that cannot be found elsewhere it may make a request to a specific business or trade association under subsection (b). That information must be provided to OEHHA if it is reasonably available. OEHHA has considerable experience and expertise in reviewing scientific reports and will endeavor to ensure that information posted on the website will be appropriate for the general public.

106. **Comment (Wine et al.):** The inclusion of the URL address on the website could be viewed as an endorsement of the website materials and can result in more "shake-down" lawsuits that are without foundation.

Response: This comment is speculative and beyond the scope of the rulemaking as the URL requirements are contained in a separate, ongoing rulemaking proposal. However, to minimize such concerns, subsection (a)(6) expressly states that the lead agency will provide a disclaimer regarding the accuracy of information that is provided on the website that may be obtained from third parties. Including a URL for a government website on a warning which is required by law on a product label cannot reasonably be seen as an endorsement by the business of the content provided on the government website.

107. **Comment (Wine et al.):** Affected parties would be forced to be vigilant in reviewing OEHHA's website materials since those documents could be viewed as an admission against interest.

Response: A business's decision to monitor the OEHHA website and the allocation of its resources falls within an individual businesses' discretion; however, OEHHA recognizes the importance of providing accurate information on the website. Under subsection (b)(5) a business will have the opportunity to request a correction of material provided on the website. Additionally, OEHHA will provide a disclaimer as to the accuracy of information provided by third parties. The second portion of the comment is a legal conclusion regarding which OEHHA disagrees. OEHHA expects that most of the information on its website will be publicly available from authoritative entities. Businesses providing information to OEHHA pursuant to subsection (b) only have to provide information that is reasonably available, and pursuant to subsection (e) can

request that the information be kept confidential if it meets the legal definition of a trade secret.

108. **Comment (Wine et al.):** 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.

Response: The comment appears in the form of a rhetorical question which requires no response. The comment is also speculative and outside the scope of this rulemaking. The provision of the proposed regulation being commented on is not part of this proposal and has in fact been changed as part of a separate, ongoing regulatory action that has not been completed. Further, the information provided on the OEHHA warning website will be prepared by OEHHA and will not dilute or diminish the content of the legally required warnings. Although it is OEHHA's practice to post comment letters received on regulatory actions on its current website, the warning website is intended for a different purpose. Third parties will not be allowed to directly post materials on the warning website.

109. **Comment (WSDO):** At the March 25, 2025 public hearing, WSDO commented that the website will only serve plaintiff attorneys and competitors.

Response: The regulation expressly states there is no private right of action that attaches to providing or not providing information to OEHHA. The information we will provide on the website will be focused on general public information about exposures where warnings are being provided. OEHHA does not anticipate that there will be opportunities for new litigation based on the regulation or our website materials.

110. **Comment (WSPA):** There are no requirements on how OEHHA must manage the website going forward, how often OEHHA must update the website, how much time OEHHA has to add new pieces of information to the website.

Response: This regulatory proposal is intended to establish the framework for a lead agency website related to warnings for listed chemicals. The regulatory language expressly states the purpose of the website and the type of information that will made available. Frequency of updating and timeframes for adding information are aspects of internal management, based on the availability of resources and are therefore not addressed in this rulemaking.

111. **Comment (WSPA):** It is not clear whether the website must contain all the information provided by regulated businesses or just some subset, and whether OEHHA is bound to ensure that information provided on the website is complete, up-to-date, and not misleading. The vagueness leaves doubt as to how helpful the website could be for

the general public. Posting inaccurate or outdated information on the website could lead to unwarranted alarm, confusion or misunderstandings.

Response: There is no provision in the regulation requiring OEHHA to post all or any part of the information it receives from a business pursuant to subsection (b). The intent of this provision is to enable OEHHA to have access to information that is not publicly available that may be helpful in understanding the basis for a Proposition 65 warning and how individuals can reduce or avoid their exposure to listed chemicals that are the subject of the warning. OEHHA will use its professional judgment and discretion in preparing fact sheets and other informational literature for the public on general categories of products and locations that frequently contain Proposition 65 warnings.

OEHHA intends to ensure the accuracy of the information it provides on its website to the greatest extent possible, consistent with its mission to protect public health and the environment. OEHHA anticipates that most information provided on the website will be obtained from authoritative agencies and will be compiled and reviewed by OEHHA scientific and legal staff. OEHHA will review information submitted by third parties, and will implement a process for review of and removal of alleged inaccurate information. Additionally, OEHHA has included a disclaimer in subsection (a)(6) regarding the accuracy of information provided by third parties. In terms of procedures for submission of contextual information, manufacturers and other interested parties may submit information directly to OEHHA to be considered for publication on the website. The website is currently in development and will include a “contact us” feature to allow for such comments. OEHHA retains its discretion concerning the content that may be posted on the website and will not automatically post material received from third parties.

III. Summary and response to comments received during the May 22, 2015 through June 15, 2015 comment period.

Comments were received from the following organizations during this comment period:

Alliance for Natural Health USA (ANH-USA)
American Cancer Society (ACS)
American Chemistry Council (ACC)
American Coatings Association (ACA)
Association of Global Automakers, Inc. and the Alliance of Automobile Manufacturers (AGA-AAM)
California Chamber of Commerce (CCC)
California Dental Association (CDA)
Center for Environmental Health (CEH)
Clean Water Action (CWA)

Rubber Manufacturers Association (RMA)
Western States Petroleum Association (WSPA)

A. Section 25205(a)

112. **Comment (ACA):** ACA supports the changes OEHHA made to the website regulation and particularly applauds the expansion of the disclaimer in subsection (a)(7) to all information on the Lead Agency Website rather than just information submitted by industry; placing a reasonable limitation on the type of additional information the lead agency can request to information related to the exposure to chemicals on the Prop 65 list; and the addition of subsection (c) which clarifies OEHHA's intent that the website regulation does not require a business to perform any new or additional testing or analysis for the sole purpose of responding to an information request from the agency.

Response: This comment does not require a response.

113. **Comment (ACA):** OEHHA should work closely with industry to ensure the information published is accurate and a fair depiction of products containing certain chemicals. ACA encourages OEHHA to speak with the Department of Toxic Substances Control (DTSC) to review the stakeholder input DTSC received after the initial public release of the first three Priority Products under the Safer Consumer Products regulations. The release of potentially inaccurate or misleading information about chemicals in certain products without allowing affected entities to review the information for inaccuracies can have unwarranted negative market impacts and undermine the program's credibility. ACA suggests that a new subsection be added that provides the opportunity to review and comment on the information before publication on the website.

Response: This commenter made a substantially similar comment during the initial comment period for this rulemaking; this comment is not directed towards the subject of this comment period, and requires no response.

114. **Comment (ACS):** The modified text indicates that a business is not required to perform any new or additional testing or analysis for the sole purpose of responding to a request made by the lead agency and if the requested information is not in the possession or control of a business, the business is not required to procure it solely for the purpose of providing it to the lead agency. We are concerned that this modification moves away from what we would like to see—more information from businesses about their products, and independent testing and appraisal of that information. We can see the situation where businesses will not conduct testing or analyses on their products out of fear that they would be compelled to produce those studies when requested. When the lead agency is concerned about public health and safety, a business should not be able to escape responsibility for providing product information by claiming no testing has been done. Using this proposed modification, we can also envision a situation where a

company could claim that a primary component ingredient that is derived from another producer is outside the realm of their toxicity, quality control, and disclosure responsibility since they did not produce the primary ingredient. It seems to us that every producer should have knowledge, disclosure, and inherited responsibility/liability for ensuring that their final product meets the intent of full disclosure of carcinogenic exposure potential. Can you clarify for us what is intended with this new language?

Response: OEHHA believes that increasing the availability of information to the public regarding exposures to listed chemicals for which they are receiving warnings furthers the purposes of the Act and benefits the health and well-being of the people of California. This change is intended to address concerns from businesses that the regulation would increase costs of testing and analysis in response to requests for information from OEHHA under subsection (b). Subsection (c) has been modified to clarify that businesses do not have to perform new or additional testing or analysis for the purpose of responding to a request from OEHHA. The subsection is limited in scope and does not apply to testing that the business may wish to conduct to determine its compliance with other aspects of Proposition 65, or in response to other legal requirements falling outside Proposition 65.

115. **Comment: (AGA-AAM):** AGA-AAM is particularly pleased that OEHHA took into account their requests to: specify that the information requested should be provided if it is readily available, thus removing the need for additional testing and coordination with extensive supply chains; and help protect trade secrets by providing manufacturers with 30 days instead of 15 to dispute trade secret claims.

Response: This comment does not require a response.

116. **Comment (AGA-AAM):** AGA-AAM continues to believe that the information requested for the website could overwhelm consumers with overly technical information. Instead AGA-AAM recommends that OEHHA provide consumers with high-level information on the characteristics of the chemicals covered by the regulation and methods of reducing exposure.

Response: This commenter made the same comment during the initial comment period for this rulemaking; this comment is not directed towards the subject of this comment period, and requires no response. However, for purposes of clarification, OEHHA does not intend to post highly technical information on the website, and instead intends to post general information appropriate for the general public.

117. **Comment (CCC):** OEHHA should incorporate into the regulation a process wherein OEHHA would provide notice to individual businesses or trade associations prior to posting information on the website. The recipient of the notice would have an opportunity to review the information prior to posting and assert whether any of the

information is materially inaccurate. A similar opportunity is provided by the Consumer Product Safety Commission.

Response: This comment is not directed towards the subject of this comment period, and requires no response.

118. **Comment (CCC):** Subsection (a)(7) is unclear. Subsection (a)(7) states that OEHHA will provide a disclaimer indicating that OEHHA cannot assure the accuracy of information it has received under subsection (b). However, subsection (a)(2) also allows OEHHA to receive information from "[a]ny person" and post that information on the website. OEHHA provides no justification as to why the public would receive a disclaimer regarding the accuracy of information provided by businesses under subsection (b), but not by any person under subsection (a)(2). The disclaimer should apply to all information received, whether by a business, interest group, or a member of the public.

Response: OEHHA has removed the reference to subsection (b) within subsection (a)(7) so that information received from all third parties for publication on the website is disclaimed.

119. **Comment (RMA):** RMA supports the proposed change to Section 25205(a)(7) removing the qualifying phrase, "from manufacturers, producers, distributors, or importers of consumer products."

Response: This comment does not require a response.

120. **Comment (RMA):** RMA believes that manufacturers are the best source for information to provide to consumers regarding the safety of a consumer product. OEHHA should only include information from government agencies and manufacturers on the website and should refer consumers directly to a manufacturer for additional information regarding a chemical in a product.

Response: This comment was also made by this commenter during the initial comment period and a response was provided. It does not require an additional response.

121. **Comment (RMA):** Section 25205(a)(2) provides the opportunity to correct information on the Lead Agency Website, however this subsection does not specify that OEHHA will remove inaccurate information. RMA recommends that Section 25205(a)(2) be revised to specify that if a request is made to correct information on the website, which is substantiated with information showing why the material is inaccurate, OEHHA should remove the inaccurate information from the website.

Response: This comment was made by this commenter during the initial comment period and a response was provided. It does not require an additional response.

B. Section 25205(b)

122. **Comment (ANH-USA):** ANH-USA stated that OEHHA should make information submission voluntary under Section 25600(d) of the Art. 6 Clear and Reasonable Warnings regulatory proposal, rather than a mandatory requirement under the Art. 2 Lead Agency Website proposal. In that case, "if information collection is voluntary, under Art. 6, section 25600(d) then Section 25600(b) of the proposal is unnecessary and should be eliminated entirely."

Response: The Lead Agency Website proposal was intentionally separated from the Clear and Reasonable Warnings regulatory proposal based on concerns that litigation for failing to warn under the Act could arise from a business failing to comply with the provisions of the Lead Agency Website regulation. Businesses and industries currently providing warnings are often the most informed as to the identity of the chemicals for which they are providing a warning. As the lead agency responsible for implementation of the Act, OEHHA has determined that obtaining information regarding exposures to listed chemicals from those businesses and industries providing warnings may be the only source of such information if it is not available publicly. OEHHA anticipates that most information provided on the website will be obtained from authoritative agencies and will be compiled and reviewed by OEHHA scientific and legal staff. OEHHA will review information submitted by third parties, and will implement a process for review of and removal of alleged inaccurate information.

123. **Comment (ACA, AGA-AAM):** Although OEHHA has stated it will be flexible with businesses when it requests information, this flexibility needs to be made explicit in the text of the regulations. A reasonable timeframe to submit the requested information would be six months or more.

Response: In response to stakeholder comments, OEHHA extended the timeframe to submit requested information to 90 days. OEHHA believes this timeframe will allow a business sufficient time to provide reasonably available information, in the possession or control of the business that does not require additional testing or analysis regarding listed chemicals for which it is providing a warning.

124. **Comment (ACA):** If OEHHA does not provide a de minimis reporting threshold, manufacturers will need to list each Prop 65 chemical in their products, regardless of if there is exposure to the chemical. ACA strongly encourages OEHHA, when posting information about chemical exposures in products, to make clear to the public which chemicals pose the most significant risks and which chemicals are unintentionally-added or byproducts. ACA suggests OEHHA provide a de minimis threshold concentration level of greater than 0.1%.

Response: Subsection (b) provides that OEHHA may ask manufacturers to provide the names of listed chemicals for which a warning is being provided. There would be no

need for the manufacturer to provide the names of listed chemicals for which there is no exposure. There are other regulatory provisions that may address the commenter's concern. For example, OEHHA adopts safe harbor levels pursuant to Articles 7 and 8 which can assist businesses in determining when an exposure would require a warning under Proposition 65. A de minimis threshold concentration level does not account for exposure and will not help businesses determine when a warning for a chemical exposure may be necessary.

125. **Comment (ACA):** ACA requests that OEHHA state that the information requested in subsection (b)(6) only needs to be provided if it is known or can be determined from information from upstream suppliers, similar to the qualification provided in subsection (b)(7).

Response: OEHHA has addressed this concern by adding subsection (c) which provides that a business is not required to perform any new or additional testing or analysis for the purpose of responding to a request from OEHHA. In addition, requested information that is not in the possession or control of the business is not required to be procured for the purpose of providing it to OEHHA.

126. **Comment (ACA):** Also subsection (b)(9) and (b)(8) should be combined and similarly qualified that the information be provided if it is known or can be determined from information from upstream suppliers.

Response: OEHHA has addressed this concern by adding subsection (c) which provides that a business is not required to perform any new or additional testing or analysis for the purpose of responding to a request from OEHHA. In addition, requested information that is not in the possession or control of the business is not required to be procured for the purpose of providing it to OEHHA.

127. **Comment (AGA-AAM):** OEHHA should also clarify how it will handle situations in which information is not submitted in the requested timeframe, or not submitted at all.

Response: OEHHA anticipates that businesses will work cooperatively with it to provide the information requested under subsection (b). We do not anticipate the need to enforce such requests, however the Attorney General has general authority to enforce California law, including regulatory requirements, and could assist OEHHA in obtaining information should that become necessary.

128. **Comment (AGA-AAM):** OEHHA should focus the information collection process on the entities that make the chemical choices and physically create the products. AGA-AAM suggests OEHHA use a data collection approach similar to DTSC's Safer Consumer Products Program concerning the order of responsibility and precedence.

Response: This comment is not directed towards the proposed modifications that were the subject of this comment period. As such, no response is required.

129. **Comment (CCC):** OEHHA should explain how it intends to use the information requested under subsection (b) and how use of the information will be limited to those purposes accordingly to assure businesses the due process protections to which they are entitled.

Response: This comment is not directed towards the proposed modifications that were the subject of this comment period. As such, no response is required.

130. **Comment (CDA):** CDA requests clarifying amendments to subsection (b) to include trade associations to the list of entities able to submit requested data and information.

Response: In response to stakeholder comments, subsection (d) was added to the proposed regulation stating that businesses may respond to a request for information through their trade organization where the lead agency requests information under subsection (b) from two or more businesses regarding the same product or exposure.

131. **Comment (RMA):** RMA supports the proposed changes to Section 25205(b)(10) which limits the information requested, "to information related to potential exposures to listed chemicals for which warnings are already being provided under the Act."

Response: This comment does not require a response.

132. **Comment (RMA):** RMA recommends that the regulations specify that businesses are not required to conduct new testing in response to a request for information and can respond that they do not have the information requested.

Response: OEHHA has addressed this concern by adding subsection (c) which provides that a business is not required to perform any new or additional testing or analysis for the purpose of responding to a request from OEHHA. In addition, requested information that is not in the possession or control of the business is not required to be procured for the purpose of providing it to OEHHA.

133. **Comment (RMA, WSPA):** Recommend that OEHHA clarify in Section 25205(b) that trade groups or other organizations can respond to a request for information on behalf of an industry.

Response: In response to stakeholder comments, subsection (d) was added to the proposed regulation stating that businesses may respond to a request for information through their trade organization where the lead agency requests information under subsection (b) from two or more businesses regarding the same product or exposure.

134. **Comment (RMA):** RMA recommends that Section 25205(b)(7) be excluded from the regulation because this information is likely considered confidential business information for many products.

Response: If a business believes information requested by OEHHA is a trade secret, the business can respond to the request by asserting the information is exempt from disclosure under subsection (e).

135. **Comment (WSPA):** WSPA agrees with the revision to Section 25205(b)(10) to improve the wording to better avoid ambiguity and overly broad application.

Response: This comment does not require a response.

136. **Comment (WSPA):** Businesses can never have complete information about all possible "anticipated routes and pathways of exposure to the listed chemical(s) for which the warning is being provided" for every individual, as Section 25205(b)(8) continues to provide.

Response: Under subsection (c), if a business does not possess or control the information, the business is not required to procure it for the purpose of providing it to the lead agency, nor is a business required to perform any new or additional testing or analysis in response to a request made by the lead agency pursuant to subsection (b).

137. **Comment (WSPA):** The change in proposed Section 25205(b)(9) from the "anticipated level of human exposure" to "estimated level of exposure" simply introduces a new ambiguous term, and does not reflect the basic problem that businesses cannot easily or reliably estimate the potential exposure level for every individual in every possible situation.

Response: Proposition 65 only requires that warnings be provided for exposures to listed chemicals above certain levels.[13] OEHHA disagrees with the characterization of the phrase "estimated level of exposure" as ambiguous since it is a necessary part of the determination of whether a warning is required at all. However, under subsection (c), if a business does not possess or control the information OEHHA requests, the business is not required to procure it for the purpose of providing it to the lead agency, nor is a business required to perform any new or additional testing or analysis in response to a request made by the lead agency pursuant to subsection (b).

C. Section 25205(c)

138. **Comment (AGA-AAM):** AGA-AAM appreciates the change of notifying businesses 30 days instead of 15 days prior to disclosure of claimed trade secrets. However, AGA-AAM suggests that language be added that the public disclosure of trade secret or confidential business information be prevented.

[13] Health and Safety Code section 25249.10; Title 27, Cal. Code of Regs., sections 25701 *et seq*.,(carcinogens) and section 25801 *et seq*., (reproductive toxins).

Response: This comment was responded to previously and is not directed to the subject of this comment period.

139. **Comment (CCC, RMA):** The provision contains ambiguities that may render it ineffective or may result in litigation. The terms "sole" and "solely" are unnecessary and the regulation would have the same intended meaning if those terms were stricken.

Response: The terms "sole" and "solely" have been stricken from subsection (c). It should be noted that subsection (c) was added to the proposed regulatory text in response to concerns from stakeholders that additional testing resulting in increased business costs would be required for the purpose of responding to a request for information from the lead agency.

140. **Comment (CCC):** To ensure consistency throughout Section 25205, the term "business" under subsection (c) should be changed to "manufacturer, producer, distributor, or importer of a product…"

Response: The term "business" is general enough to cover all the more specific types of businesses set out in subsection (c) but OEHHA believes it would be clearer to state specifically that the OEHHA request for information could be directed to any business that is providing a warning under Proposition 65.

141. **Comment (CCC):** Despite the clarification that no additional testing would be required for purposes of providing information, businesses will incur costs including the time and resources needed to compile information and to monitor the website to ensure that the posted information is accurate.

Response: The cost of compiling existing information based on OEHHA's request should be negligible. Further, the regulation allows for such information to be gathered and produced via a business group or trade organization, thus lessening the impact on individual businesses. A business's decision to monitor the OEHHA website and the allocation of its resources falls within an individual businesses' discretion, however, OEHHA recognizes the importance of providing accurate information on the website. Under subsection (a)(5) a business will have the opportunity to request a correction of material provided on the website. Additionally, OEHHA will provide a disclaimer as to the accuracy of information provided by third parties.

142. **Comment (WSPA):** The section could be misconstrued to allow "new" testing or analysis for the purpose of supplementing the website if OEHHA could find some other justification for that testing or analysis. WSPA suggests the language be amended to add that subsection (c) cannot be used to require testing.

Response: Subsection (c) specifically states that a business is not required to perform 'any' new testing or analysis for the purpose of responding to a request from OEHHA

and that information not in the possession or control of the business is required to be procured. No further modifications are necessary.

D. Section 25205(d)

143. **Comment (RMA):** RMA supports the change to provide businesses 30 days to submit additional information to justify a claim that the information is a trade secret or seek judicial review of the agency's decision to disclose the information.

Response: This comment does not require a response.

144. **Comment (WSPA):** WSPA continues to believe that a minimum of 60 days will be needed to assemble and provide the documentation to justify the trade secret claim or to contest the determination in an appropriate proceeding.

Response: OEHHA has considered this comment and believes that 30 days is sufficient time to respond to support a claim of confidentiality or contest the determination in a legal proceeding while complying with the time constraints of the Public Records Act.

E. Statutory Authority Comments

145. Four commenters **(ACA, ANH-USA, CCC and RMA)** assert that OEHHA lacks the statutory authority to require businesses to provide supplemental information for a warning. The commenters instead recommend that OEHHA rely on the provision proposed in Section 25600(d) to voluntarily obtain the same type of information.

Response: These comments are not directed towards the modification of text that is the subject of this comment period. As such, no response is required.

F. Miscellaneous/General Comments

146. **Comment (ANH-USA):** Businesses will need to conduct specific chemical testing and will incur costs for monitoring the website to ensure the information is accurate and does not misrepresent their products or otherwise mislead the public.

Response: In response to the request for express language in the regulation, OEHHA modified the regulatory language to provide that a business is not required to perform any new or additional testing analysis for the purpose of responding to a request from the lead agency. The amended text additionally provides that if the requested information is not in the possession or control of a business, the business is not required to procure it for the purpose of providing the information to the lead agency. A business's decision to monitor the OEHHA website and the allocation of its resources falls within an individual businesses' discretion.

147. **Comment (ANH-USA):** It is not clear how the collected information will be used. The information could have serious legal and financial implications for businesses if used "as a roadmap for new litigation".

Response: Information collected for the website will be used by OEHHA to develop content for the Lead Agency Website. OEHHA intends to ensure the accuracy of the information it provides on its website to the greatest extent possible, consistent with its mission to protect public health and the environment. OEHHA anticipates that most information provided on the website will be obtained from authoritative agencies and will be compiled and reviewed by OEHHA scientific and legal staff. OEHHA will review information submitted by third parties, and will implement a process for review of and removal of alleged inaccurate information. Additionally, OEHHA has included a disclaimer in subsection (a)(6) regarding the accuracy of information provided by third parties. In terms of procedures for submission of contextual information, manufacturers and other interested parties may submit information directly OEHHA to be considered for publication on the website. The website is currently in development and will include a "contact us" feature to allow for such comments. OEHHA retains its discretion concerning the content that may be posted on the website and will not automatically post material received from third parties. Regarding legal implications, the Lead Agency Website proposal was intentionally removed from the Clear and Reasonable Warnings regulatory proposal based on stakeholder comments that litigation for failing to warn under the Act could arise from a business failing to comply with the provisions of the Lead Agency Website regulation.

148. **Comment (ACC):** ACC again urges OEHHA not to launch a stand-alone Proposition 65 website for the reasons previously stated in its April 8, 2015 comments.

Response: This comment is not within the scope of the modified text for this comment period, and no response is required.

149. **Comment (CEH):** CEH supports the adoption of the regulation and believes the website provides a simple, cost effective method of providing important information to consumers and that the potential benefits are substantial.

Response: Comment noted, no response is required.

150. **Comment (CWA):** CWA supports the adoption of the regulation. It would be an effective way to disseminate useful information to consumers. CWA disagrees that establishing the website is overly expensive.

Response: Comment noted, no response is required.

151. **Comment (WSPA):** WSPA is concerned that the regulations will be manipulated by Prop 65 plaintiffs who seek to leverage the website information into a lawsuit.

Response: OEHHA disagrees with the comment. The regulation was specifically removed from the Article 6, Clear and Reasonable Warnings proposed regulatory action based on stakeholder concern over litigation based on a failure to provide a warning under the Act. The information OEHHA will provide on the website will focus on general information about exposures where warnings are being provided and OEHHA anticipates that the information posted on the website generally will not be product specific. OEHHA does not expect that there will be opportunities for new litigation based on the regulation or materials posted on the website.

152. **Comment (WSPA):** The regulations lack any requirements on how OEHHA will manage the website, such as, how frequently will the website be updated, what timeframes will OEHHA use to add new information, what will be the content of the website, and what will be OEHHA's responsibility to ensure the accuracy of the information posted?

Response: This comment is identical to comments previously made and a response has already been provided. It is outside the scope of this comment period and requires no additional response.

IV. Summary and response to comments received during the comment period of September 4, 2015 through September 21, 2015.

Comments were received from the following organizations during this comment period:

American Chemistry Council (ACC)
American Coatings Association (ACA)
Association of Global Automakers, Inc. and Alliance of Automobile Manufacturers (AGA-AAM)
California Chamber of Commerce (CCC)
Wine Institute, Beer Institute and the Distilled Spirits Council (Wine et al.)

A. Section 25205(a)

153. **Comment (ACA, ACC):** Businesses should have reasonable advance opportunity to review the data about its product or facility before the information is provided to the public by posting on the website.

Response: This comment is outside the scope of this comment period and does not require a response.

154. **Comment (ACA):** OEHHA should respond to and review the supplemental information in a timely manner. Businesses should be provided a process to review information impacting their business. If inaccuracies are claimed, the contested

information should be immediately removed from the website if it is shown to be inaccurate.

Response: This comment is outside the scope of this comment period and does not require a response.

155. **Comment (CCC):** OEHHA should provide notice to individual businesses or trade associations prior to posting product specific, company specific, or industry specific information on the website.

Response: The topic of this comment was previously responded to, is outside the scope of this comment period, and does not require a response.

156. **Comment (Wine et al.):** The proposed regulation does not state that OEHHA has peer reviewed the materials posted, nor that an independent assessment has been conducted regarding merits of the posted documents. It is particularly relevant in light of subsections (a)(2) & (a)(3) that places OEHHA in a position where it would be rendering medical advice.

Response: The topic of this comment is outside the scope of this comment period and does not require a response.

157. **Comment (Wine et al.):** Wine et al. appreciates the newly-proposed disclaimer language in Section 25205(a)(6), however, it does not go far enough and businesses remain at risk for frivolous lawsuits based upon information posted on the website. They urge that a new subsection be added that would prohibit any private action or legal claim based upon the information posted on the website and that no liability would accrue from the information.

Response: OEHHA carefully considered the comment but the requested scope of the disclaimer exceeds the intended purpose of the regulatory proposal. OEHHA thus declines to make the requested change to the regulatory text.

B. Section 25205(b)

158. **Comment (ACA):** ACA expressed concerns about the difficulty in obtaining the supplemental information requested in subsection (b) by OEHHA. Downstream formulators often receive limited information from their upstream suppliers via safety data sheets.

Response: OEHHA has addressed this concern by the addition of subsection (c), which provides that a business is not required to perform any new or additional testing or analysis for the purpose of responding to a request from OEHHA. In addition, requested information that is not in the possession or control of the business is not required to be procured for the purpose of providing

it to OEHHA. Downstream formulators can simply advise OEHHA that the requested information is not in their possession or under their control.

159. **Comment (ACA):** OEHHA should provide a de minimis reporting threshold because manufacturers cannot adequately determine the exposure to residual Prop 65 chemicals based on the limited information provided by upstream suppliers. ACA suggested two alternative amendments to either adopt a de minimis concentration level of greater than 0.1% or include a statement as to whether the chemical is intentionally added, a contaminant, or an unintentional byproduct.

Response: This comment is substantially the same as one made by this commenter and responded to during the first comment period, and is not directed towards the subject of this comment period. Therefore, no further response is required.

160. **Comment (ACA):** OEHHA should acknowledge in the regulations that downstream formulators may not have the exposure information from their suppliers that is requested. Subsection (b)(6) should be revised to state that the information only needs to be provided if it is known or can be reasonably determined from information from upstream suppliers.

Response: OEHHA has addressed this concern with the addition of subsection (c), which provides that a business is not required to perform any new or additional testing or analysis for the purpose of responding to a request for information from OEHHA. In addition, requested information that is not in the possession or control of the business is not required to be procured for the purpose of providing it to OEHHA. Because of this there is no need to specifically identify downstream formulators and upstream suppliers in the proposed regulatory language.

161. **Comment (ACA):** Subsection (b)(9) should be combined with subsection (b)(8) to allow manufacturers to provide appropriate exposure information if it is known or can be determined from information from upstream suppliers.

Response: OEHHA has addressed this concern with the addition of subsection (c), which provides that a business is not required to perform any new or additional testing or analysis for the purpose of responding to a request from OEHHA. In addition, requested information that is not in the possession or control of the business is not required to be procured for the purpose of providing it to OEHHA. Manufacturers are not required to provide requested information that is not in their possession or under their control.

162. **Comment (ACA):** ACA expressed a need for a longer timeframe to respond to OEHHA request for supplemental information. Six months would allow for a more reasonable time period for manufacturers to gather, review and confirm accuracy of requested information. Additionally, to prevent confusion, the regulation should make

clear that the deadline commences on the day the business receives (date of receipt) the request rather than the date OEHHA sends the request; ACA requested “of receipt” be added

Response: In response to stakeholder comments regarding the timeframe required to respond to request from OEHHA to submit requested information, OEHHA has modified the timeframe to 90 days. The regulation states within 90 days of the lead agency’s request which means 90 days from the date of the request. The date of the receipt of the request would not resolve potential confusion regarding the final submittal deadline. If the business believes there was a substantial lag in time between the date of the request and when it received the request, it could notify OEHHA.

163. **Comment (AGA-AAM):** AGA-AAM requests that no less than six months from the receipt of the request be provided to respond to the request. Sufficient time is necessary for manufacturers to do their due diligence to obtain accurate information. The statement is inaccurate that providing information will not add any significant new costs to businesses. Gathering the necessary information would require substantial resources.

Response: In response to stakeholder comments, OEHHA modified the timeframe to submit requested information to 90 days. OEHHA disagrees with the comment regarding the cost to obtain necessary information. A business is only required to provide readily available information and would not be required to perform any new or additional testing or analyses to provide requested information. In addition, requested information that is not in the possession or control of the business is not required to be procured for the purpose of providing it to OEHHA.

164. **Comment (AGA-AAM):** Clarify what is meant by “Source” in subsection (b)(4) in the context of "environmental warnings". “Location” clearly indicated that the area of the car in which the chemical is present should be identified, whereas “source” is more ambiguous. Clarify the meaning of “source” to the extent that that section would not apply to automobiles.

Response: Environmental warnings are different from consumer product warnings. Automobiles are products and OEHHA does not anticipate a need to provide an environmental warning for these products. However, when considering a warning that is being provided at a particular location (such as an industrial facility or site), OEHHA could request information about the “source” of the exposure for which the warning is being given if it is not clear. The business that is providing the warning may be in the best position to provide that information.

C. Section 25205(e)

165. **Comments (AGA-AAM):** AGA-AAM appreciates the change in number of days from 15 days to 30 days that businesses would receive notification prior to disclosure of claimed trade secrets. However, language should be strengthened to stress the importance of protecting against the disclosure of trade secrets. AGA-AAM recommends adding a new subparagraph that prevents the public disclosure of trade secret or confidential business information.

Response: This comment is not directed at the modifications that were the subject of this comment period; therefore, no response is required.

D. Statutory Authority Comments

166. **Comment (ACC):** OEHHA does not have the statutory authority to present supplemental information to the public nor to compel the submission of additional information from businesses.

Response: This comment is not directed at the modifications that were the subject of this comment period and requires no response.

167. **Comment (ACC):** ACC asserts that both the warning proposal and website proposal as currently drafted violate the First Amendment of the Constitution with respect to compelled speech principles.

Response: The comment regarding the Lead Agency Website proposal is not directed at the subject of this comment period and requires no response. The portion of the comment concerning the Article 6 Clear and Reasonable Warnings regulation proposal will be evaluated as part of that separate regulatory process.

168. **Comment (ACA):** In the proposed Section 25600(d) it states that a person *can* provide supplemental information to the warnings required under Section 25608. OEHHA should use the proposed provision in the Article 6 warning regulations to obtain the similar requested information without going outside of its authority.

Response: This comment is not directed at the subject of the modified text of the regulations. Section 25600(d) is part of the proposed Article 6 Clear and Reasonable Warnings regulations. The Article 2 proposed regulatory action was specifically separated from the Article 6 regulatory proposal and is distinct from the clear and reasonable warning requirement. Subsection (g) specifies that failure to comply with the requirements of this section is not a failure to provide a clear and reasonable warning. The lead agency respectfully disagrees with the characterization of this regulation as exceeding its statutory authority to further the purposes of Proposition 65.

169. **Comment (CCC):** Neither Proposition 65 nor the APA confer authority to OEHHA to require businesses to provide information related to their products. OEHHA appears

to be relying not on Proposition 65, but on Government Code sections 11346.5(a)(11) and 11346.3(d) as authority for the agency to mandate businesses to provide information. Those sections only establish procedural requirements for rulemaking.

Response: Government Code Sections 11346.5(a)(11) and 11346.3(d) set forth required findings for an agency proposing to adopt a regulation requiring a report from a business, but are not the authority relied upon by OEHHA. As expressly stated in the proposed regulatory text, the lead agency authority lies with Health and Safety Code Section 25249.12, which authorizes OEHHA as the lead agency for Proposition 65 to adopt regulations that implement Proposition 65 and "further its purposes".

E. Miscellaneous/General Comments

170. **Comments (ACC):** Consumers with questions about product and facility safety should be referred first to the product manufacturer or facility operator. Promoting a website to address such questions could delay consumers from promptly receiving accurate information about the product.

Response: This comment is not directed at the modifications that were the subject of this comment period and requires no response.

171. **Comment (ACC):** OEHHA must assure that the data it seeks to disseminate is high quality, reliable, objective, and accurate. It is insufficient to merely collect and report "publicly available" data, regardless of source, quality, or verification. OEHHA should outline the procedures it intends to follow rather than state they will be developed later.

Response: This comment is not directed at the modifications that were the subject of this comment period and requires no response.

172. **Comment (ACA):** ACA recommends that OEHHA allow businesses to register a point of contact for requests for information to ensure that appropriate employees receive the request. ACA also recommends OEHHA define how they plan to contact businesses, either by email or mail, or both. Last, ACA suggests that website content be in a web based format, such as HMTL rather than in downloadable format so OEHHA can control the information and protect business from the posting of any inaccurate statements.

Response: This comment is outside the scope of this rulemaking and no response is required.

173. **Comment (AGA-AAM):** The requested information could overwhelm consumers with overly technical information. OEHHA should instead provide consumers with high-level information on the chemical characteristics, typical uses of the chemical in products, and methods of reducing exposure.

Response: This comment is not directed towards the changes proposed during this comment period. As such, no response is required.

174. **Comment (Wine et al.):** Would posting, *"The Dietary Guideline for Americans"* 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.

Response: This comment is not directed towards the changes proposed during this comment period; this comment is directed at a provision in a separate regulatory proposal. As such, no response is required.

175. **Comment (Wine et al.):** The provisions of this rule will inevitably provide "fodder" for opportunistic litigation against businesses subject to Proposition 65.

Response: This comment is not directed towards the changes proposed during this comment period. As such, no response is required.

176. **Comment (Wine et al.):** Businesses would need to be constantly vigilant in reviewing OEHHA's website materials since those documents could be viewed as an admission against interest, even though businesses had no control or say regarding their posting.

Response: This comment is not directed towards the changes proposed during this comment period. As such, no response is required.

V. Pre-Regulatory Technical, Theoretical, and/or Empirical Study, Reports, or Documents

Prior to this rulemaking, OEHHA received formal and informal feedback regarding the potential development of a regulatory proposal concerning the Article 2 Lead Agency Website. Under the heading of "Technical, Theoretical, and/or Empirical Study, Reports, or Documents Relied Upon in the Initial Statement of Reasons for this regulatory action, OEHHA indicated that it had reviewed oral and written public comments from interested parties."[14] These communications were reviewed and considered but were not relied upon. The agency did not rely on any specific data or other factual information, technical, theoretical, and empirical studies or reports in the adoption of this regulation prior to the submission of this rulemaking.

[14] Initial Statement of Reasons, Title 27, California Code of Regulations: Proposed Adoption of Article 2, Section 25205, Lead Agency Website, at 10.

VI. Local Mandate Determination

OEHHA has determined this regulatory action will not impose a mandate on local agencies or school districts nor does it require reimbursement by the State pursuant to Part 7 (commencing with Section 17500) of Division 4 of the Government Code. Local agencies and school districts are exempt from Proposition 65. OEHHA has also determined that no nondiscretionary costs or savings to local agencies or school districts will result from this regulatory action. The regulation simply sets out a framework for an OEHHA website to provide supplemental information for members of the public seeking information regarding exposure to a listed chemical for which they are receiving a warning.

VII. Alternatives Determination

In accordance with Government Code Section 11346.9(a)(7), OEHHA has considered available alternatives to determine whether any alternative would be more effective in carrying out the purpose for which the regulations were proposed. OEHHA has also considered whether an alternative existed that would be as effective as, and less burdensome to, affected private persons than the proposed action. OEHHA has determined that no alternative considered would be more effective, or as effective and less burdensome to affected private persons, than the proposed regulation because the regulation will further the ‘right-to-know” purposes of Proposition 65 by providing important supplemental and contextual information to the public regarding potential exposures to listed chemicals in furtherance of the purposes of the Act.

Pursuant to Government Code 11346.9(a)(4)&(5), OEHHA considered alternatives to the proposed regulation. One alternative considered was that OEHHA withdraw the entire regulatory proposal. OEHHA has determined that a website is an effective manner of disseminating information to the public concerning exposures to listed chemicals for which warnings are being provided. Withdrawing this rulemaking would not be as effective in carrying out the “right-to-know” purposes of Proposition 65, and the public would be deprived of valuable supplemental and contextual information concerning potential exposures to listed chemicals. Because of the importance of the information to the health and well-being of the people of the state of California, OEHHA has rejected this alternative. Another alternative considered was that OEHHA modify the regulatory proposal so that submission of information requested by OEHHA under Section 25205(b) is voluntary rather than mandatory. OEHHA anticipates that much of the information required for the website will be easily obtained by OEHHA staff, however, the manufacturer, producer, distributor, or importer of a product, or a particular business that is providing a Proposition 65 warning is often in the best position to provide important information regarding the listed chemicals for which it is providing a warning pursuant to the Act. In some cases, these businesses may be the only source

of the information OEHHA needs. Making submission of information requested by OEHHA optional could result in important information about exposures to listed chemicals that could impact the health and well-being of the people of the state of California remaining unavailable to OEHHA and the public. This alternative would not further the purposes of the Act and was therefore rejected. There were no small-business specific alternatives submitted during the rulemaking process.