April 13, 2016

Via First Class and Electronic Mail

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Re:  Proposed Emergency Regulation - California Office of Environmental Health Hazard and Assessment
Warnings for Exposures to Bisphenol A from Canned and Bottled Food and Beverages
OAL File No.  2016-0408-02E

Dear Sir or Madam:

I am writing on behalf of the Center for Environmental Health (“CEH”), Just Transitions Alliance, Clean Water Action, As You Sow, Physicians for Social Responsibility – Los Angeles, the Environmental Law Foundation and Black Women for Wellness to comment on the above-referenced emergency regulation. By way of this regulation, the California Office of Environmental Health Hazard and Assessment (“OEHHA”) proposes to undermine the important health and safety protections of Proposition 65. See Health & Safety Code § 25249.6. There is no emergency here, OEHHA has not justified its failure to act sooner, and the proposed regulation serves no purpose other than to unlawfully shield industry from complying with Proposition 65 and to withhold from California consumers the information to which they are entitled under the law. Therefore, OAL should reject the proposed regulation.

I. BACKGROUND

A. Overview of Proposition 65.

Proposition 65 is a right to know statute that was enacted in 1986 to remedy gaps in the law and failures by state agencies to protect Californians against toxic chemicals. The people of California find that hazardous chemicals pose a serious potential threat to their health and well-being, that state government agencies have failed to provide them with adequate protection and that these failures have been serious enough to lead to investigations by federal agencies of the administration of California’s toxic protection programs.
Safe Drinking Water & Toxic Enforcement Act of 1986, Section 1. Because the government had done an insufficient job of protecting Californians from toxic chemicals, the Act generally prohibits businesses from knowingly and intentionally exposing individuals to known carcinogens and reproductive toxicants without a clear and reasonable warning. Health & Safety Code § 25249.6. To provide businesses with sufficient time to comply, Proposition 65’s warning requirement does not take effect as to a particular chemical until 12 months after the chemical is formally added to the list of chemicals known to cause cancer or reproductive harm. Id., § 25249.10(b).

Since being approved by California voters in 1986, Proposition 65 has removed toxic chemicals (those causing cancer or reproductive harm) from thousands of everyday consumer products. Water faucets, diaper rash medications, toys, candy, wooden play structures, and electrical cords are just a few examples. Some of the biggest benefits of Proposition 65 occur behind the scenes. Without fanfare and litigation many companies have removed toxic chemicals from their products, both in California and around the world, to avoid the consumer warnings required by the statute. In such cases, no one brought litigation; instead, companies proactively decided to implement safer practices and/or make safer products in order to comply with the law.

B. OEHHA’s Existing Warning Regulations.

OEHHA has promulgated regulations establishing “safe harbor” Proposition 65 warnings for certain types of exposures. While businesses are not required to use these safe harbor warnings, the warnings are deemed by OEHHA’s regulations to comply with Proposition 65’s clear and reasonable warning requirement. 27 Cal. Code Regs. § 25603(a). For consumer product exposures, OEHHA’s regulations require that the warning be displayed in a manner such “as to render it likely to be read and understood by an ordinary individual under customary conditions of purchase or use.” Id., § 25603.1(c). The safe harbor warning message for consumer products for exposures to reproductive toxicants is:

WARNING: This product contains a chemical known to the State of California to cause reproductive toxicity.

Id., § 25603.2(a)(2).

Recently, in a separate regulatory proceeding that is being conducted on a non-emergency basis, OEHHA has proposed to amend its Proposition 65 warning regulations. OEHHA’s regulatory proposal stems from a May 2013 announcement by Governor Brown proposing to reform Proposition 65 by, among other things, “improving how the public is warned about dangerous chemicals” by requiring “more useful information to the public on what they are being exposed to and how they can protect themselves.” Press Release, Office of Governor Edmund G. Brown, Jr., Governor Brown Proposes to Reform Proposition 65. (May 7, 2013).1 OEHHA has indicated that an update to its regulations is necessary since “the existing safe harbor warnings lack the specificity necessary to ensure that the public receives useful information about potential exposures.” Initial Statement of Reasons (“ISOR”), Tit. 27, Cal. Code of Regs., Adoption of New Article 6, Nov. 27, 2015, p. 4.2 The most recent draft of these amendments (issued November 27, 2015) will explicitly require that any consumer product warnings (including for food) be provided in a “product-specific” manner. Proposed 27 Cal. Code Regs. §§ 25602(a) - (c) and 25607.1(a).3 The proposed new safe harbor warning message for exposure to listed reproductive toxicants in food is:

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1 Available at http://gov.ca.gov/news.php?id=18026.
2 Available at http://www.oehha.ca.gov/prop65/CRNR_notices/WarningWeb/pdf/112715WarningReg%20ISOR.pdf.
WARNING: Consuming this product can expose you to [name of one or more chemicals], a chemical [or chemicals] known to the State of California to cause birth defects or other reproductive harm. For more information go to www.P65Warnings.ca.gov/food.”

Id., § 25607.2(a)(3).

Requiring product-specific warnings is key to ensuring that Proposition 65’s purpose is achieved. As OEHHA explains in its Amended Notice of Emergency Action:

Proposition 65 is a right-to-know law based on the concept that members of the public have a right to know when they are being exposed to listed carcinogens or reproductive toxicants . . . the law is designed to help consumers decide whether to assume the risks of purchasing particular products that result in exposures to listed chemicals. Amended Notice of Emergency Action, April 2, 2016, p. 2.

C. OEHHA’s Regulation of BPA under Proposition 65.

OEHHA has been considering whether to list BPA as a reproductive toxicant under Proposition 65 since at least July 2009. After previously adding BPA to the list and then dropping the listing under industry pressure, OEHHA finally added BPA to the Proposition 65 list of chemicals known to cause reproductive toxicity on May 11, 2015. Thus, pursuant to the one year grace period built into the statute, the warning requirement becomes effective on May 11, 2016.

OEHHA has also known for a long time that BPA exposures are caused by many canned and bottled food and beverages. For instance, OEHHA’s Amended Notice of Emergency cites to a 2011 published study entitled, “Concentration of Bisphenol A in Highly Consumed Canned Foods on the U.S. Market.” Amended Notice of Emergency, p. 5 fn. 17.

D. The Proposed Emergency Regulation.

Although OEHHA finalized its listing of BPA as a reproductive toxicant under Proposition 65 last May, OEHHA waited until now to issue the emergency regulation. In the past few weeks, OEHHA issued two versions of the regulation and accompanying notice that differ in several important respects that are discussed in more detail below. Under the current version of the proposed regulation, companies that manufacture or distribute canned and bottled food and beverages that expose consumers to BPA can comply with Proposition 65’s warning requirement in the ordinary fashion: by affixing “a label to the product bearing a warning that satisfies Section 25249.6 of the Act.” Proposed Section 25603.3(f)(1)(A). However, the proposed regulation also provides that such companies can comply with their warning obligation by providing retailers that sell their products with a written notice: (1) stating that a warning is required for certain canned or bottled food and beverages; (2) identifying by “name or description . . . such as a Universal Product Code or other identifying designation” the canned or bottled food or beverage that requires a warning; and (3) providing or offering to provide point-of-sale warning signs with specified language. Proposed Section 25603.3(f)(1)(B). The specified warning language for such signs reads:

WARNING: Many food and beverage cans have linings containing bisphenol A (BPA), a chemical known to the State of California to cause harm to the female reproductive system. Jar lids and bottle caps may also contain BPA. You can be exposed to BPA when you consume foods or beverages packaged in these containers. For more information go to: www.P65Warnings.ca.gov/BPA.

Proposed Section 25603.3(g).

OEHHA’s first version of the emergency regulation did not include any opportunity to cure violations of the new warning regime. This is unsurprising since Proposition 65 does not
provide any right to cure violations of the law.\textsuperscript{4} However, apparently at the behest of the retail industry, the current version of the regulation includes the following provision:

\begin{quote}
(A) For the purpose of this section, where a retail seller substantially complies with all the provisions of this section, a limited opportunity to cure exists where there is a minor deviation from the requirements of this section such as the short-term absence of a required sign, which:
\begin{itemize}
  \item[(i)] Is not the result of intentional neglect or disregard for the requirements of this section; and
  \item[(ii)] Is not avoidable using normal and customary quality control or maintenance, and
  \item[(iii)] Is corrected within 24 hours of discovery or notification.
\end{itemize}

Proposed Section 25630.3(f)(2)(A).
\end{quote}

II. DISCUSSION

A. There Is No Emergency Justifying A Departure From Ordinary Notice and Comment Procedures.

To justify acting on an emergency basis, OEHHA must find that an emergency situation “clearly poses such an immediate, serious harm that delaying action to allow public comment would be inconsistent with the public interest.” Gov’t Code § 11346.1(a)(3). An “emergency” is a situation that calls for immediate action to “avoid serious harm to the public peace, health, safety, or general welfare.” Id., § 11342.545. A finding of emergency cannot be based upon “expediency, convenience, best interest, general public need, or speculation.” Id., at § 11346.1(b)(2). Here, OEHHA has not demonstrated that there is an emergency here that warrants a departure from the ordinary rulemaking procedures required by the Administrative Procedure Act.

As noted above, OEHHA issued two different “Notices of Emergency Action” over the past several weeks, and the differences between the two notices are telling. According to OEHHA’s first Notice, which was issued on March 17, 2016, an emergency exists because, if its proposed regulation is not in place by May 11, 2016: (1) “it is possible that private enforcers may serve” 60-day notices of intent to sue alleging a failure to warn for BPA exposures from canned and bottled food and beverages; (2) some retailers may decide to comply with Proposition 65 by removing BPA-containing canned and bottled food and beverages from store shelves or by warning consumers about exposures to BPA from canned and bottled food and beverages; and (3) the removal of such products, or the provision of warnings on such products, “may prompt” certain individuals, particularly low-income Californians, from “purchasing canned or bottled vegetables and fruits, to the detriment of their own health.” OEHHA Initial Notice of Emergency Action, March 17, 2016, pp. 3-4 (emphasis added). In other words, OEHHA was apparently concerned that, absent this regulation, companies may

\textsuperscript{4} In 2013, the Legislature passed AB227, which bars private enforcement actions under Proposition 65 relating to four particular exposure scenarios where the alleged violator both cures the violation and pays a specified penalty within 14 days of receiving a pre-suit notice. See Health & Safety Code § 25249.7(k). This limited opportunity to cure differs from OEHHA’s current proposal because: (1) public prosecutors can still pursue Proposition 65 violations that are not subject to private enforcement (id., § 25249.7(n)); (2) alleged violators must not only cure the violation but also must pay a penalty to avoid private enforcement (id., § 25249.7(k)(2)(B)); and (3) a company may only avail itself of AB227’s cure provisions once (id., § 25249.7(m)). Most importantly, AB227 was passed by the Legislature, which has the authority to amend Proposition 65 with a two-thirds vote, and not by OEHHA, which does not.
actually comply with Proposition 65 as the voters intended by: (1) removing a known reproductive toxicant from their products; or (2) providing a clear and reasonable warning that allows consumers to make informed choices about whether to expose themselves to toxic chemicals. A law working the way it was intended is not an emergency under anyone’s definition of that term.

Apparently recognizing the flaw in its first attempt at manufacturing an emergency, and having offended the low income communities on whose behalf OEHHA was purporting to act,5 OEHHA’s second notice shifts tack and ties the emergency to the potential for public confusion that “could result from inconsistent warning messages about these products.” Amended Notice of Emergency Action, April 1, 2016, p. 8. In particular, OEHHA claims that, absent the emergency regulation, some businesses may elect to provide different warning messages regarding exposures to BPA from canned and bottled foods and beverages, and some may perform exposure assessments and determine that no warning is required at all. Ibid. OEHHA’s new justification suffers from the same flaw as its first: Proposition 65 working the way it was intended to work by providing product-specific warnings when warranted does not constitute an emergency.

In fact, the same circumstances that OEHHA identifies as constituting an emergency here exist for every single chemical and potential product exposure subject to Proposition 65. In particular, for every product, businesses that are knowingly and intentionally exposing consumers to listed chemicals must determine whether to provide a clear and reasonable warning or whether the business will be able to demonstrate that the exposure is below the level requiring a warning. While OEHHA admits that the claimed emergency applies to “the majority of Proposition 65 warnings over the years,” the agency seeks to distinguish the present situation on the ground that there are a lot of canned and bottled food and beverage products that contain BPA. Amended Notice of Emergency, p. 6. However, the fact that there is a high potential for consumers to be exposed to BPA through the food and beverages they consume counsels in favor of product-specific warnings, not the generic point of sale signs OEHHA is proposing.6

OEHHA’s claimed emergency is also based on a series of speculative and flawed assumptions that are completely unsupported by any data. See Gov’t Code § 11346.1(a)(3) (“The finding of emergency shall also identify each technical, theoretical, and empirical study, if any, upon which the agency relies.”). For instance, while OEHHA expresses unfounded concern about the potential for inconsistent warning messages, OEHHA admits that, absent the emergency regulation, most businesses will simply comply with OEHHA’s existing safe harbor

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6 OEHHA also attempts to distinguish the present situation on the ground that OEHHA has not yet established a regulatory safe harbor level, or “Maximum Allowable Dose Level (MADL)” for BPA. Amended Notice of Emergency Action, p. 4. However, of the over 300 chemicals that are listed as reproductive toxicants under Proposition 65, OEHHA has only established MADLs for approximately 2 dozen chemicals. Cf. 27 Cal. Code Regs. §§ 27001, subd. (c) and 25805, subd. (b). Thus, this purported distinction fails as to the vast majority of Proposition 65 chemicals. It is also worth noting that: (1) the statute does not even contemplate the establishment of regulatory safe harbor levels, instead placing the burden on businesses to prove that the exposure will have no observable effect assuming exposure at one thousand (1,000) times the level in question;” (Health & Safety Code § 25249.10(c)); and (2) even with a MADL in place, businesses must conduct exposure assessments to determine whether their products result in an exposure above the MADL.
warning regulation by warning that the food or beverage product “contains a chemical known to the State of California to cause birth defects or other reproductive harm.”” Amended Notice of Emergency, p. 6. Again, companies complying with the law is not an emergency.

While OEHHA admits that most companies will simply provide product-specific safe harbor warnings as they currently do with other products and chemicals, OEHHA is apparently dissatisfied with its existing safe harbor warning because it does not require businesses to name the specific chemical at issue or the health effect associated with it. Amended Notice of Emergency, p. 6.7 If OEHHA does not like its existing safe harbor warning regulations, it can and should amend them; in fact, OEHHA has spent the past several years in an ordinary rulemaking process that is nearing completion to do just that. However, having failed to complete that process, OEHHA cannot circumvent ordinary notice and comment rulemaking as to one particular chemical in a subset of products.

Ultimately, OEHHA’s true purpose in enacting this regulation is to protect companies from potential Proposition 65 liability for exposing consumers to BPA in canned and bottled foods and beverages without a clear and reasonable warning. OEHHA’s action in this regard is particularly egregious since companies have already been provided with the 12 months that voters determined was the appropriate amount of time to bring themselves into compliance with Proposition 65’s warning requirement with respect to BPA exposures. Because a state agency’s desire to protect industry from legal liability for violating state law does not constitute an emergency, OAL should reject the proposed regulation.

B. The Proposed Regulation Does Not Even Address The Purported Emergency.

The flaw in OEHHA’s emergency analysis is underscored when one considers that the regulation as drafted does not even address the emergency identified by OEHHA. In particular, OEHHA claims that the regulation will “help avoid consumer confusion and at the same time provide consistent, informative, and meaningful warnings to consumers about significant exposures to BPA.” However, there is no evidence that signs at cash registers using OEHHA’s proposed generic and confusing language will in any way provide a clearer message to consumers than a straightforward warning label on or near the products. To the contrary, to the extent they are even read by consumers, the proposed signs are likely to generate more confusion.

Also, the proposed regulation allows manufacturers, producers, packagers, importers and distributors of canned and bottled food and beverages to affix a label to such products bearing any warning that satisfies Proposition 65’s clear and reasonable warning requirement. Proposed Section 25603.3(f)(1)(A). Thus, while the proposed regulations provide the option of posting point-of-sale signs with meaningless information about possible BPA exposures, companies will still retain the option of providing more meaningful warning messages on the product themselves. CEH strongly disagrees with OEHHA’s contention that product-specific warnings authorized by OEHHA’s current safe harbor regulations will lead to consumer confusion. However, the important point for present purposes is that the proposed regulation does not solve this purported emergency since companies will still retain the option of providing the very warnings that OEHHA itself developed but is now attacking.

OEHHA also fails to articulate how the potential consumer confusion the agency is purporting to address will be alleviated by the opportunity to cure that the regulation offers to retail sellers. To the contrary, this provision is completely unrelated to the emergency OEHHA is purporting to address.

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7 This latter point is untrue as the existing safe harbor regulations require the warning to indicate whether the health effect at issue is cancer or reproductive harm.
OEHHA’s failure to articulate a true emergency is exacerbated by the fact that the proposed regulation will not even address the agency’s fabricated emergency. Thus, OAL should reject the regulation.

C. OEHHA Has Not Justified Its Failure To Act Sooner.

Where the situation identified by the agency as constituting an emergency “was known by the agency adopting the emergency regulation in sufficient time to have been addressed through nonemergency regulations . . ., the finding of emergency shall include facts explaining the failure to address the situation through nonemergency regulations.” Gov’t Code § Gov’t Code § 11346.1(b)(2). It is indisputable that OEHHA has known for at least a year that BPA’s listing would become effective this May. OEHHA has failed to identify any facts to justify its failure to act sooner through nonemergency regulations.

The only “fact” OEHHA cites to support its failure to act sooner is that the agency “encountered technical and practical problems” in its attempt to develop a safe harbor level for oral exposures to BPA. Amended Notice of Emergency, p. 9. Under Proposition 65, exposure to a reproductive toxicant like BPA is exempt from the warning requirement if it is “[a]n exposure for which the person responsible can show that . . . the exposure will have no observable effect assuming exposure at one thousand (1,000) times the level in question.” Health & Safety Code § 25249.10(c). Although Proposition 65 places the burden on the entity causing the exposure to prove the applicability of the exemption, OEHHA sometimes develops safe harbor levels that companies can rely upon in proving that defense. Here, OEHHA is apparently claiming that it has been unsuccessfully trying to establish such a safe harbor level for oral exposures to BPA.

OEHHA’s failed efforts to develop such a safe harbor level do not justify its failure to act sooner to address the warning requirements for BPA exposures from canned and bottled foods and beverages. Without developing such a safe harbor level, and then applying it to BPA exposures from canned and bottled foods and beverages, OEHHA would have no way of knowing whether warnings are even required for such exposures. In other words, even if OEHHA had successfully developed a safe harbor level, that safe harbor level may have had absolutely no impact on the status quo.

Furthermore, OEHHA is very familiar with the difficulty and complexity of developing a safe harbor level, particularly for a chemical as prevalent, controversial, and well-studied as BPA. Developing a safe harbor level for BPA and then defending that level in regulatory proceedings and likely court challenges will inevitably be time-consuming. Thus, OEHHA could and should have known that it would find itself in this situation, and could and should have worked on parallel tracks to develop warning regulations for BPA exposures.

OAL should reject the proposed emergency regulation since OEHHA has not justified its failure to act sooner in accordance with ordinary notice and comment procedures.

D. The Regulation Does Not Satisfy The Substantive Standards Of The APA.

OAL is obligated to reject a proposed regulation that does not meet the six substantive standards of the APA: (1) necessity; (2) authority; (3) clarity; (4) consistency; (5) reference; and (6) nonduplication. OEHHA’s proposed regulation should be rejected as failing to satisfy any of these standards other than reference.

I. The Regulation Is Unnecessary.

For purposes of the APA, “‘[n]ecessity’ means the record of the rulemaking proceeding demonstrates by substantial evidence the need for a regulation to effectuate the purpose of the statute, court decision, or other provision of law that the regulation implements, interprets, or
makes specific, taking into account the totality of the record.” Gov’t. Code § 11349(a). Here, there is no need for OEHHA to issue regulations to interpret the clear and reasonable warning requirement of Proposition 65 as the agency has long-standing regulations already in place that have been relied upon by industry and the public for years. Furthermore, OEHHA has already expended considerable resources updating those warning regulations through a nonemergency rulemaking proceeding. Finally, these regulations are not necessary to effectuate the purpose of Proposition 65 since, by endorsing the use of vague and meaningless warnings, and by purporting to provide retail sellers with an opportunity to cure violations of the law, the regulations undermine Proposition 65’s fundamental purpose of providing consumers with the right to know before they are exposed to known reproductive toxicants like BPA.

OEHHA’s endorsement of vague warnings that do not distinguish for consumers which products will expose them to BPA is particularly unnecessary since companies should be able to easily identify which canned and bottled foods and beverages contain BPA. The chemical is an intentionally added ingredient to the cans and bottles at issue, and food and beverage companies should easily be able to identify their BPA-containing products by lot number. Indeed, the regulation itself requires that this information be provided to retail sellers of the products. Proposed Section 25603.3(f)(1)(B)(ii). There is no reason this same information should not be provided to consumers so they can make the informed choice to which they are entitled under Proposition 65.

2. OEHHA Lacks Authority To Promulgate A Regulation That Contradicts And Undermines A Statute.

“‘Authority’ means the provision of law which permits or obligates the agency to adopt, amend, or repeal a regulation.” Gov’t. Code § 11349(b). While OEHHA has been designated by the Governor as the “Lead Agency” with authority to adopt regulations under Proposition 65, the agency has no authority to promulgate regulations that contradict the statute:

Whenever by the express or implied terms of any statute a state agency has authority to adopt regulations to implement, interpret, make specific or otherwise carry out the provisions of the statute, no regulation adopted is valid or effective unless consistent and not in conflict with the statute and reasonably necessary to effectuate the purpose of the statute.

Gov’t Code § 11342.2. By permitting vague warnings that are intentionally crafted to ensure that consumers do not exercise their right to choose to avoid being exposed to toxic chemicals, and by purporting to give an unlimited “Get out of Jail Free” card to retail sellers who violate the law, the regulation contradicts Proposition 65. Thus, OEHHA lacks authority to promulgate it.

3. The Proposed Regulation Lacks Clarity.

“‘Clarity’ means written or displayed so that the meaning of regulations will be easily understood by those persons directly affected by them.” Gov’t. Code § 11349(c). Here, the proposed regulation lacks clarity in several key respects.

First and foremost, although Proposition 65 requires any warning to be “clear and reasonable,” the proposed warning language is anything but clear. The 5 inch square cash register warning states that “[m]any food and beverage cans have linings containing bisphenol A (BPA),” that “[j]ar lids and bottle caps may also contain BPA, that that “[y]ou can be exposed to BPA when you consume foods or beverages packaged in these containers.” This cash register sign also provides consumers absolutely no information as to which products in any particular store could expose them to BPA. Should consumers avoid all canned foods and beverages or just some? All products in jars with lids or bottles with caps or just some?
Second, unless a warning is being affixed to the label of a product, the regulation requires notice to retailers of “the name or description of the canned or bottled foods or beverages for which a warning is being provided, such as a Universal Product Code or other identifying designation.” Proposed Section 25603.3(f)(1)(B)(ii). This vague language is likely to lead to disputes between manufacturers and retailers as to whether the description being provided is sufficient. For instance, does saying “canned vegetables” suffice? “Canned green beans”?

Third, and compounding the second problem, the regulation states that, “The placement and maintenance of warning signs is the responsibility of the retailer of the affected products.” Proposed Section 25603.3(f)(2). The “affected products” language lacks clarity and is likely to lead to disputes as to whether a particular warning covers a particular product.

Finally, the cure provision is riddled with ambiguous terms like “substantially complies with,” “limited opportunity,” “minor deviation,” “short-term,” “intentional neglect or disregard,” “avoidable,” and “customary quality control or maintenance.” These vague terms are bound to lead to litigation and uncertainty, which is precisely what OEHHA claims to want to avoid.

4. The Proposed Regulation Is Inconsistent With Existing Law.

A proposed regulation must be “in harmony with, and not in conflict with or contradictory to, existing statutes, court decisions, or other provisions of law.” Gov’t Code §§11349(d) and 11349.1(a)(4). Here, the proposed regulation conflicts with Proposition 65, OEHHA’s existing and proposed warning regulations, and court decisions. Therefore, OAL must reject the regulation.

First, Proposition 65 requires companies to provide consumers with “clear and reasonable” warnings before exposing them to listed chemicals. Health & Safety Code § 25249.6. The whole purpose of the statute’s warning requirement is to provide consumers with meaningful information to enable them to choose whether to be exposed to known carcinogens and reproductive toxicants. The proposed regulation conflicts with Proposition 65’s clear and reasonable warning requirement by endorsing the use of a vague warning that provides no information to consumers as to which products are at issue.

The regulation’s cure provision for retail sellers is also inconsistent with Proposition 65, which prohibits knowing and intentional exposures to listed chemicals without a warning, authorizes penalties and injunctive relief for violations of the statute, and does not include any opportunity to cure. The cure provision will remove any incentive for retail sellers to comply with the law since they will be comfortable in the knowledge that they can always cure any violations that are brought to their attention and then argue that they are immune from any liability.

Second, the regulation runs afoul of OEHHA’s existing warning regulations, which require that any warning be displayed in a manner such “as to render it likely to be read and understood by an ordinary individual under customary conditions of purchase or use.” 27 Cal. Code Regs. § 25603.1(c). The proposed warning language is intentionally crafted in a way that it will be neither read nor understood by an ordinary individual.

The proposed regulation also conflicts with OEHHA’s existing safe harbor warning regulations, which correctly require that any warning for consumer product exposures inform consumers that a specific product (“this product”) contains a listed chemical. Otherwise, consumers are left to wonder which products contain a chemical and which do not, which will completely undermine the right-to-know purpose of Proposition 65. Contrary to these existing regulations, the proposed warning language provides vague information about a broad range of products in a way that does not allow consumer to differentiate which products the warning applies to.
The proposed warning language also conflicts with OEHHA’s existing warning regulations by stating that consumers “can be exposed to BPA” when they consume foods or beverages stored in BPA-containing containers. In developing its existing safe harbor regulations, OEHHA specifically rejected a proposal from one commentator that the agency should permit use of the phrase “you may be exposed” to a listed chemical, explaining, “where there is an exposure to a listed chemical, such a warning would be untrue, since in fact the individual will be exposed . . . As a general rule, advising that a person ‘may be exposed’ appears inaccurate and unclear.” Final Statement of Reasons (“FSOR”), Section 12601, p. 4 (emphasis in original). As the agency further explained:

As for the use of general warnings, such as ‘this product may contain’ a listed chemical, providing a ‘safe harbor’ for the use of such a warning might discourage businesses from taking the steps necessary to determine whether chemicals listed are in fact present. They might simply provide the warning to avoid liability, and the public would be little better informed as a result.

Id., p. 26. This same reasoning applies with equal force to the proposed regulation, which will provide the public with no information as to which specific products they should avoid if they do not want to be exposed to BPA.8

This proposal also conflicts with the proposed update to OEHHA’s warning regulations that the agency has been pursuing through ordinary (non-emergency) rulemaking proceedings for the past two years. Like the existing regulations, those proposed regulations require meaningful product-specific warnings to allow consumers to make informed decisions about exposures to toxic chemicals.

Worse yet, pursuing this emergency regulation will completely undermine OEHHA’s longstanding efforts to make Proposition 65 warnings more meaningful. If the agency formalizes its position that a vague and watered down statement like the one proposed here is clear and reasonable, any company can use similar language for other consumer product exposures and rely upon OEHHA’s finding here. The agency apparently anticipates and tries to avoid this problem by stating, “OEHHA views this emergency regulation as addressing a unique situation. This emergency regulation should not be used as a precedent for future regulatory actions.” Amended Notice of Emergency, p. 7. However, since OEHHA elsewhere admits that the purported emergency situation applies to all chemicals in all products, this conclusory language is unlikely to prevent companies from trying to rely on this regulation in other situations.

Finally, the proposed regulation conflicts with court decisions interpreting Proposition 65’s clear and reasonable warning requirement. For instance, in Ingredient Communication Council, Inc. v. Lungren (1992) 2 Cal.App.4th 1480, 1494 (emphasis added), the court rejected a warning scheme as insufficient since “[a]n invitation to inquire about possible warnings on products is not equivalent to providing the consumer a warning about a specific product.” Indeed, “[c]ase law has discussed the importance of designing warnings to identify the specific consumer product that is the subject of the warning.” American Meat Institute v. Leeman (2009) 180 Cal.App.4th 728, 761. As the court in Leeman elaborated:

In short, to comply with Proposition 65, point of sale warnings must be designed to effectively communicate to consumers that the specific product targeted by the warning is a carcinogen or a reproductive toxin.

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8 OEHHA only allowed for use of the phrase “may contain” with respect to bulk fruits, nuts and vegetables due to variability in terms of the presence of listed chemicals and the potential for spoilage while businesses determine which bulk shipments would require warnings. See FSOR, pp. 4 and 26; t27 Cal. Code Regs. § 25603.3(b). These justifications do not exist in the case of canned and bottled foods and beverages with BPA, which is intentionally added to specific products that are easily traceable through existing business practices and that will not spoil rapidly.
Ibid. OEHHA’s proposed point of sale warning sign directly conflicts with this directive from the Leeman court by failing to communicate to consumers which specific products are targeted by the warning. At best, the proposed warning sign here would prompt consumers to inquire of a retail sellers as to which products leach BPA into their food and beverages, which is precisely the type of invitation to inquire about a warning that the court struck down in the ICC case.

5. The Proposed Regulation Is Duplicative Of Existing Law.

OAL should also reject the regulation is duplicative. “[‘Nonduplication’ means that a regulation does not serve the same purpose as a state or federal statute or another regulation.]” Gov’t. Code § 11349(f). Here, the proposed regulation is duplicative of OEHHA’s existing warning regulations, which already address the manner, placement and language for Proposition 65 warnings for consumer products like those at issue here.

III. CONCLUSION

By definition, because it deprives the public of the full opportunity to participate in the rulemaking process, emergency regulations are only permissible when an agency encounters a truly extraordinary and dire situation that could not have been anticipated and that requires immediate action. OEHHA’s desire to protect industry from Proposition 65 enforcement actions does not qualify as such an emergency. Worse yet, OEHHA’s proposed regulation takes a paternalistic approach that shields California consumers from information to which they are legally entitled. OAL should reject the proposed regulation.

Sincerely,

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