



Western States Petroleum Association
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Catherine H. Reheis-Boyd
President

April 26, 2016

Via E-Mail (to P65Public.Comments@oehha.ca.gov)

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

Re: Western States Petroleum Association's Comments on Proposed Amendments to Proposition 65 Clear and Reasonable Warning Regulations

Dear Ms. Vela:

The Western States Petroleum Association ("WSPA") again appreciates the opportunity to provide comments on the Office of Environmental Health Hazard Assessment's ("OEHHA") March 25, 2016 proposed amended regulations ("March 2016 Draft") governing "clear and reasonable warnings" under Proposition 65 ("Prop 65") (proposed repeal and adoption of Title 27, Article 6 of the California Code of Regulations ("C.C.R.")). WSPA submitted comments on April 8, 2015 and June 13, 2014 on OEHHA's previously proposed revisions to the "clear and reasonable warning" regulations. Because some of the issues continue to apply to the March 2016 Draft, except as specifically modified herein, WSPA incorporates these previous comments herein by reference. WSPA also reserves the right to supplement these comments as additional or different information is made available to the public about the proposed regulations.

WSPA continues to believe that changes to the Prop 65 warning regulations are long overdue. Regulatory changes are a needed first step in implementing Governor Brown's call for Prop 65 reforms to "end[] frivolous 'shake-down' lawsuits" and "improv[e] how the public is warned." Governor Edmund G. Brown, Jr. Press Release, "Governor Brown Proposed to Reform Proposition 65," May 7, 2013. We applaud the state's long-standing efforts to better define which warnings are "clear and reasonable" as one way to deter continuing frivolous Prop 65 litigation, and we believe the state's established and approved determinations over time are an important part of this effort and deserve deference in the regulations. We share OEHHA's desire to ensure warnings convey accurate, concise and understandable information to the public. And we believe businesses should have sufficient time to implement the numerous new requirements being proposed in the draft amended regulations.

While we were happy to see a few of the proposed changes in our April 8, 2015 comments adopted into the March 2016 Draft, WSPA remains concerned that many necessary revisions have not yet been made.

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I. The Regulations Still Fail to Give Adequate Lead Time to Business to Implement the Numerous New Requirements of the Proposed Amended Warning Regulations

The March 2016 Draft retains the provision to give regulated businesses only two years to implement the many proposed new and changed requirements for “clear and reasonable” warnings under Prop 65. *See* proposed 27 C.C.R. § 25600(b). We continue to believe that this is a mistake. Regulated businesses – especially small businesses – need more time to make the substantial changes that the regulatory amendments in the March 2016 Draft would require. These changes would potentially impact thousands of Prop 65 warnings statewide. A substantial number of these warnings have been posted and relied on by businesses for many years. WSPA members have relied on Prop 65 warnings that have been closely scrutinized and approved by the Attorney General decades ago. Changing and posting new warnings in compliance with the many new requirements in the March 2016 Draft will require more lead time for most regulated businesses than two years.

WSPA believes that the regulations should provide at least three years for implementation of these new requirements, to ensure that the new requirements are understood and fully adopted by the regulated community. A shorter lead time only risks incomplete implementation and insufficient time for regulated businesses to determine whether and how their existing warnings should be modified to meet the new requirements.

II. The March 2016 Draft Continues to Lack a Safe Harbor for Prop 65 Warnings Already Approved by the State as “Clear and Reasonable”

WSPA also is concerned that the March 2016 Draft continues to omit from the “safe harbor” provisions of Subarticle 2 of Article 6 an explicit protection for Prop 65 warnings that have been approved by OEHHA or the state Attorney General. While proposed Section 25600(e) in the March 2016 Draft would provide a safe harbor for a “warning method or content” approved in a “court-ordered settlement or final judgment,” the proposed regulations do not extend the same protection for warning methods or content approved by the very state agencies with direct responsibility for adopting and enforcing the Prop 65 warning regulations. OEHHA has yet to provide any explanation why court-approved warning methods and content are entitled to deference under the regulations as valid evidence that the warning methods and content are indeed “clear and reasonable,” but state-approved warning methods and content somehow are not.

As WSPA has stated previously, state-approved warnings often undergo far more rigorous scrutiny than court-approved warnings, which typically require only the agreement of the parties to the litigation. State-approved warnings are analyzed by the agencies most familiar with the Prop 65 “clear and reasonable warning” requirements and their enforcement. This was the case with WSPA’s own long-standing Prop 65 warnings, which were reviewed and approved by the state Attorney General’s office and have provided “clear and reasonable” warnings to the public for decades without serious issue. Indeed, the currently proposed regulations in the March 2016 Draft would reach the bizarre result that Prop 65 warnings closely reviewed and approved by OEHHA *itself* would not be entitled to “safe harbor” protection under the “clear and reasonable warning” regulations promulgated by OEHHA.

This directly contradicts OEHHA’s goal of providing “safe harbor” provisions that describe warning methods and content already pre-approved by the state as “clear and reasonable.” It also unnecessarily forces entities with state-approved warnings to review, remove and revise existing warnings that have been effective for years.

III. Revised “Safe Harbor” Regulations Mandating Names of Chemicals in Some Warnings are Much Improved, But Still Do Not Make Warnings More Meaningful or Useful to Public

WSPA is pleased that the March 2016 Draft has streamlined the chemical naming requirements in product and environmental warnings to require only “one or more of the listed chemicals for which the person has determined a warning is required.” Proposed 27 C.C.R. § 25601(c); *see also* proposed 27 C.C.R. § 25605(a) (requiring names of one or more exposure sources and one or more chemicals at risk of exposure). We believe this change reduces the burden on regulated businesses who will be required to change existing Prop 65 product and environmental warnings. However, we continue to believe that naming *any* individual chemicals in the Prop 65 warning is not likely to make the warning any more meaningful or informative to the public. We are aware of no evidence that including one or more chemical names on the warning helps individuals accurately evaluate the risk of exposure or identify ways to avoid exposure. WSPA is not aware of any general demand from the public that Prop 65 warnings contain specific chemical information, and our members do not typically receive such requests for chemical information..

Adding one or more chemical names to the warning does not make the warning inherently more “clear” or “reasonable” under Prop 65. Such additions only make the warning unnecessarily cumbersome, especially considering the requirement that the warning contain a link to OEHHHA’s Prop 65 warnings website for the public to obtain more information about the meaning and significance of the warning. Indeed, for on-label consumer product exposure warnings, the currently proposed regulations would not require listing of any specific chemical names – only a link to OEHHHA’s Prop 65 warnings website for consumers to obtain additional information. We think this is the correct approach for all product and environmental warnings, and urge OEHHHA to consider further revisions to the March 2016 Draft that would remove entirely any requirement to include specific chemical names on warnings.

IV. The March 2016 Draft Would Require Methods of Transmitting Environmental Exposure Warnings That Are Unduly Burdensome and Not Required to Ensure the Warning is “Clear and Reasonable”

WSPA believes the warning transmission methods for environmental exposures provided in Section 25604 of the March 2016 Draft continue to impose unnecessary burdens on businesses and do not promote the cause of making the warning more “clear and reasonable” to the public. The Draft would require the environmental warnings for “indoor environments or outdoor spaces with clearly defined entrances” to meet the requirements of Section 25604(a)(1) to qualify for the safe harbor protection, but does not define the term “clearly defined entrance.” This forces regulated businesses to guess at the phrase’s meaning and where “all” such “public entrances” are for purposes of posting required warnings. Such ambiguity does not meaningfully enhance the public’s receipt of necessary warning information, but only places a burden on businesses and provides a new avenue for potential litigation.

The proposed regulation also continues to require that warnings delivered by mail, electronically or in newspapers identify “the source of the exposure” and include “a map that identifies the affected area.” Once again, these phrases are not defined and likely would be subject to an expansive interpretation by opportunistic Prop 65 plaintiffs. For locations where environmental exposures may be diffuse and intermittent, it may be difficult for a business to create a map that can completely identify exactly where exposures will and will not occur, and under what circumstances. It also further clutters what should be a simple, straightforward and understandable warning. Attempting to mandate all of this information in a warning notice – particularly in newspaper warnings with limited page space – only makes the warning more cumbersome and less useful for

the public, while exacting further costs from regulated businesses in attempting to create new warnings meeting the safe harbor requirements.

Also, the March 2016 Draft continues to impose a significant burden on businesses to provide warnings in other languages “if any label, labeling or sign about a product is provided in a language or languages other than or in addition to English” or if any “other signage in the affected area” uses those languages. *See* Proposed 27 C.C.R. §§ 25602(d), 25604(a)(1)(B), 25607.24(b). Businesses face an even greater burden in the requirement to provide transmitted environmental exposure warnings “in any other language ordinarily used by the business to communicate with members of the public.” Proposed 27 C.C.R. § 25604(a)(2)(D). These provisions are fraught with ambiguity and will not only force businesses to revise warnings to reflect potentially multiple other languages appearing on any product labeling or signage, but also ponder what other languages the business may “ordinarily use” for purposes of further revising their Prop 65 warnings. Once again, Prop 65 plaintiffs could exploit this ambiguity to bring lawsuits against businesses claiming that warnings were not provided in a sufficient number of languages. The end result will be warnings that are even lengthier and more unwieldy, and accordingly, less likely to be read and understood by the public. WSPA urges OEHHA to consider dropping this burdensome multiple language requirement in favor of directing the public to OEHHA’s Prop 65 warnings website, where further information can be provided in any and all languages OEHHA desires.

Finally, the March 2016 Draft continues to require that mailed or electronically sent warning notices must be “delivered to each occupant in the affected area.” Proposed 27 C.C.R. § 25604(a)(2). As WSPA has previously commented, such a requirement is directly at odds with Section 25249.11 of the California Health and Safety Code, which provides that warning notices “need not be provided separately to each exposed individual and may be provided by general methods . . . provided that the warning accomplished is clear and reasonable.” We continue to believe that this proposed requirement for individual delivery of warnings is prohibited by the Prop 65 statutes. WSPA urges OEHHA to further amend proposed Section 25604 to remove the requirement for individual delivery of warnings, and instead require that warnings be transmitted in a way that is designed to fairly convey a “clear and reasonable” warning to exposed individuals.

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Once again, WSPA appreciates the opportunity to comment on the proposed Prop 65 “clear and reasonable” warning regulations. We are especially pleased that the proposed regulations have been significantly improved over the past year, and commend OEHHA for its hard work in finding ways to further streamline the warning requirements, provide certainty for stakeholders, and properly balance the benefits of the warning requirements against the burdens imposed on business. With further revision and clarification, we believe the proposed regulatory amendments can properly ensure warnings are “clear and reasonable” while eliminating the ambiguities that would otherwise fuel frivolous and wasteful lawsuits. We will continue to work collaboratively with OEHHA to finalize these proposed amendments, and look forward to your further revisions in the weeks to come.

Sincerely,

