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***Submitted electronically through***: Comment Submissions - Draft Regulatory Language Omnibus 2026 - OEHHA

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Dear Ms. Vela,

The Center for Environmental Health (CEH) appreciates the opportunity to provide comments regarding OEHHA's proposed Omnibus 2026 Rulemaking proposing modifications to Article 6 of the Safe Drinking Water and Toxic Enforcement Act of 1986 (Proposition 65). We appreciate the opportunity to respond to several of the proposed topics set forth in OEHHA's proposed rulemaking, particularly topics 2, 4, 6, and 7, as set forth below:

**A. Topic 2. Technical fix aligning "short-form" warning chemical descriptor with full-length warning – chemicals "including." Sections 25603(b) short-form, and 25607.2(b) food short-form.**

The proposed changes to Section 25603(b) and 25607.2(b) relate to Proposition 65's "short form" warnings. OEHHA's proposed language allows companies to provide short-form warnings for "one or more chemicals." CEH takes issue with OEHHA's proposed changes for two reasons: it allows companies to (1) provide short form warnings regardless of whether there is ample space for a long form warning on the product and (2) not specify whether the chemical listed on the warning should be the most recognizable toxic chemical contained in a product or food. We address each of these concerns below:

**1. There should be a maximum label size for short form warnings.**

In 2021, when OEHHA initiated its rulemaking proceeding to amend the short form warning regulations, the agency stated:

> Implementation of the warning regulations has revealed the need for express limits on the use of the short-form warning for consumer products. The regulation did not limit application of the short-form warning to a maximum label surface area. While OEHHA intended for this warning option to only be used for small products or containers with insufficient space for the longer warning, businesses have used the short form warning on a wide range of consumer products that have more than enough label space for the longer warning.

Initial Statement of Reasons ("ISOR"), Proposed Amendments to Article 6, Jan. 2021.

OEHHA continued to recognize this problem in the ISOR issued in conjunction with this rulemaking:

> After adopting the safe harbor warning regulations in August 2016, OEHHA found that many businesses were using the short-form warning for a wide variety of consumer products, regardless of product or package size. For example, OEHHA has received multiple inquiries from members of the public concerning short-form warnings provided on large products with ample space for full-length warnings, including home appliances such as washing machines, refrigerators, and stoves.

ISOR, Proposed Amendments to Article 6, Oct. 27, 2023, p. 7. Having identified this as one of the primary purposes of its regulatory efforts, OEHHA previously proposed maximum label size limits for the use of the short form warning. However, OEHHA abandoned that effort which essentially blessed the use of short form warnings on any product irrespective of label size.

To the extent a label is sufficiently large to accommodate a "full" safe harbor warning, there is no valid justification for providing a safe harbor for a shorter form of warning. By allowing the short-form warning on products with sufficient label space to accommodate the full-length warning, the proposed regulation will deny consumers full access to information necessary for informed decision making. Accordingly, CEH proposes the following language:

Section 25603. Consumer Product Exposure Warnings—Content.

[ . . . ]

(b) A short-form warning may only be provided on the label pursuant to Section 25602(a)(4) if there is no space on the label to provide the full warning language and it includes:

2. **The chemical listed in the short form warning should be the most recognizable chemical in the product, and the short form warning should list at least one chemical from each warning category where applicable.**

From a public health perspective, and in alignment with the intent of the law, all Proposition 65 chemicals in a product should be listed on warnings. Given that different chemicals have different health endpoints, consumers deserve the right to know which specific Proposition 65 chemicals consumers are being exposed to in the products they are considering purchasing. Just like diabetics look at food labels to avoid products with high levels of sugar and people with high blood pressure try to limit salt intake, cancer survivors want to avoid carcinogens and families suffering from infertility want to avoid any reproductive toxicants. While consumers are likely to care about both, allowing companies to disclose only one chemical for each hazard endpoint (a carcinogen and/or a reproductive toxicant) fails to provide consumers with equitable access to the information they need to make the best choice for themselves and their families. Similarly, allowing companies to disclose any Proposition 65 chemical included in a product, instead of the most recognizable one, enables companies to theoretically pick and choose the most obscure Proposition 65 chemical contained in the product, understanding that most consumers would be unaware of the severity of the carcinogenic and/or reproductivity toxicity of certain toxic chemicals.

However, where space does not allow for the inclusion of all the chemicals, OEHHA should require: (1) that short form warnings list the most recognizable Proposition 65 toxic chemical; and (2) that short form warnings list at least one chemical for each of the heath warning categories- carcinogenicity and reproductive toxicity. Currently, where the inclusion of only one (or two if both hazard endpoints are covered) of potentially many listed chemicals in a product is required, companies will list the least recognizable chemical in order to obfuscate the potential risks associated with the product. OEHHA should require companies listing only a single carcinogen and/or reproductive toxicant to list the highest ranked chemical on a list such as this ATSDR priority chemical list that is found within the product: https://www.atsdr.cdc.gov/programs/substance-priority-list.html.

**B. <u>Topic 4</u>. Clarifying when a chemical is naturally occurring in a product such that a warning is not required. Section 25501(a)(3).**

CEH applauds OEHHA's intent to clarify the naturally occurring exemption. However, the proposed change to Section 255001(a)(3), which adds language that "a listed chemical which has been extracted or concentrated from any source, such as a plant, may be present in a product as the result of human activity even if the extraction or concentration did not change the Chemical Abstract Services Registry Number," is confusing and does not actually clarify when a chemical is naturally occurring.

A chemical is "naturally occurring" if "it is a natural constituent of a food, or if it is present in a food solely as a result of absorption or accumulation of the chemical which is

naturally present in the environment in which the food is raised, or grown, or obtained…" 27 C.C.R. § 25501(a)(1). However, "[a] chemical is naturally occurring only to the extent that the chemical did not result from known human activity." 27 C.C.R. § 25501(a)(3).

The Final Statement of Reasons ("FSOR") explains that there are a few limited human activities that do not negate the "naturally occurring" exemption. The FSOR specifically lists those agricultural practices which fall outside the scope of "human activity," or that are "ordinary cultivation practices." Such practices include "planting, plowing, and irrigation, which are basic to crop production and ***are not likely to cause an increased level of a listed chemical in food***." *See* FSOR Section 12501 (June 1989) at p. 9, emphasis added. Other practices that increase the concentration of a listed chemical in a food, however, constitute human activity that would negate the naturally occurring exemption.

The FSOR for Sec. 25501 addressed several comments requesting changes to the "human activity" provision and explains why OEHHA did not adopt such proposed changes. For example, OEHHA noted that "[s]everal comments requested that "human activity" exclude "customary methods of food processing" because they are such an integral part of the food supply system that they are not discretionary human activities. (citations omitted)." The FSOR address another comment which "suggested several amendments to subdivisions (a)(1) and (a)(3) which would define "naturally occurring chemical" to include chemicals in a food which develop as a result of "natural processes" from natural sources in the food or the environment and would provide that a chemical is naturally occurring to the extent that the chemical "is not added or is otherwise not an intended result of any known human activity." (citations omitted)." OEHHA rejected those proposed changes, stating that, "chemical changes in food initiated by a known human activity are the 'result of known human activity' for purposes of subdivision (a)(3), even if these changes are not intended and even if they involve 'natural processes.'" *See* FSOR at p. 9.

While the original regulatory text and FSOR seem to make it clear that human activity that increases the concentration of a naturally occurring listed chemical beyond that which occurs in the food substance would result in non-exempt exposures resulting from the increased amount of the chemical due to the human activity, a 2002 letter from Colleen Heck to Gary Roberts has led to some confusion regarding this issue. In that letter, Ms. Heck states that any methyleugenol found in or separated from basil that is used in other products would qualify as "naturally occurring in food." See Letter re: Methyleugenol (Jan. 8, 2002) (the "Letter"). While the Letter was never published anywhere or even posted on OEHHA's website, many companies claim that they have relied on this letter to mean that exposures to any amount of a naturally occurring chemical in food – even if that chemical is extracted or processed using elaborate machinery and equipment, or is concentrated to levels way beyond the concentration found in the food are nevertheless exempt from Proposition 65's warning requirement. Under this interpretation, a naturally occurring chemical that is separated from a food through a highly technical, chemical, or other human-driven process and becomes highly concentrated as a result

of this process would still carry the naturally occurring exemption when it is added to other products.

This misconception and/or purposeful ignorance of the underlying regulation can lead to absurd results. For example, naturally occurring lead could be chemically extracted from vegetables and then concentrated together with lead extracted from other vegetables to form enough lead to make lead fishing weights. The Letter would seem to indicate that the resulting fishing weights would be exempt from Proposition 65's warning requirement since the lead used was naturally occurring in food.

This position, if true, seems to directly contradict the regulations. In the example above, the extraction and concentration of the chemical both involve significant human activity that significantly increases the concentration of the listed chemical. Additionally, 27 CCR §25501(a)(4) provides that a chemical is naturally occurring "only to the extent that it was not avoidable by good agricultural or good manufacturing practices." In the above example, the manufacturing processes significantly increase the concentration and amount of the listed chemical, which also seems to directly contradict the requirements of this regulation.

Accordingly, CEH applauds OEHHA's proposal to clarify the language of the regulation to ensure that the original intent of the regulation prevails. However, in order to accomplish this, CEH proposes that OEHHA include the following language in Section 25501(a)(3), as set forth below:

> (3) A chemical is naturally occurring only to the extent that the chemical did not result from any known human activity. Where a food contains a chemical, in part naturally occurring and in part added as a result of known human activity, "exposure" can only occur as to that portion of the chemical which resulted from such human activity. For purposes of this section, "human activity" does not include sowing, planting, irrigation, or plowing or other mechanical preparation of soil for agricultural purposes; but does include the addition of chemicals to irrigation water applied to soil or crops. Extraction of a chemical from a source, such as a plant, which results in an increased concentration of that chemical, constitutes human activity. A listed chemical which has been extracted or concentrated from any source, such as a plant, may be present in a product as the result of human activity even if the extraction or concentration did not change the Chemical Abstract Services Registry Number.

Ensuring that activities which result in an increased concentration of a listed chemical in a food constitutes human activity is aligned with the intent of the statute and the regulations. CEH believes that the addition of the above language will actually help clarify when a chemical is naturally occurring and when it is not.

**C. Topic 6. Simplifying language regarding retailers' responsibility to give manufacturer warnings to the public. Section 25600.2(e).**

CEH supports OEHHA's proposed revisions to Section 25600.2(e)(3) and (4) but believes that the language of the statute can be simplified further so that all upstream and downstream entities are well-aware of their obligations as they relate to providing warnings to the public.

To this end, CEH suggests an additional revision to Section 25600.2(e)(5), as set forth below:

> (5) The retail seller has actual knowledge of the potential consumer product exposure requiring the warning~~, and there is no manufacturer, producer, packager, importer, supplier, or distributor of the product who~~:
>
> [ . . . ]

The proposed revision makes Section 25600.2(e)(5) clearer, as it ensures that retail sellers need only have ***actual knowledge*** of the potential consumer product exposure to be responsible for providing the warning required by Section 25249.6. The problem with the existing language is that it allows retailers to avoid providing warnings for products even where they have actual knowledge of the exposures resulting from use of products they sell from the supplier. If, for example, a supplier passes along a warning to a retailer, but not the requisite number of warning materials, the retailer can ignore passing along the warning to its customers provided the supplier is a "person in the course of doing business" listed with the California Secretary of State. This is contrary to the statute.

**D. Topic 7. Adding QR codes as a warning method. Sections 25601(c) and 25602(a)(2).**

Despite the prevalence of "Quick response (QR) Codes" after the 2020 pandemic, it remains CEH's position that warnings provided by QR codes that are posted on a sign, shelf tag, shelf sign, or on the label or labeling of a product do not constitute clear and reasonable warnings, as they limit the information that consumers have immediate access to prior to purchase and they require consumers to (1) have a smartphone and (2) take additional steps to receive information that should be prominently displayed on the product itself.

While on average 91% of American adults own a smartphone, according to data from the Pew Research Center, only 78% of adults aged 65 and older own a smartphone. See, https://www.pewresearch.org/internet/fact-sheet/mobile/. Seniors aged 65 and older are at a higher risk of disease and often more vulnerable populations. Accordingly, it is critical that all consumers have access to the same information so that they can make informed purchasing decisions. If a subset of the population does not have access to important health information from a consumer product warning, then the statute has been violated. Consumers have a right to know

about what toxic chemicals are in foods and products that they purchase. QR codes essentially require consumers to not only have a smart phone, but to have the requisite data to use the internet on that smart phone, which raise issues of environmental justice and classism, QR codes also require consumers to take additional steps when they are shopping to get information that should already be "prominently displayed" with "such conspicuousness as to render the warning likely to be seen, read, and understood". 27 Cal. Code Regs. §25601(c). QR codes require consumers to take additional steps to receive crucial warning information and therefore does not pass the test for warnings set out in the *Ingredient Communication Council v. Lungren* case. (1992) 2 Cal. App. 4th 1480 ("An invitation to inquire about possible warnings on products is not equivalent to providing the consumer a warning about a specific product.") QR code warnings would require significant effort on the part of the consumer: taking out their phone (assuming they have one), using the camera to access the website (assuming the camera is working and the store is located somewhere with good cellphone service), and then repeating these steps dozens of times during a single shopping trip. This is simply too laborious to provide clear and reasonable warnings.

Nevertheless, QR codes allow sellers to provide more information regarding the exposure than the label might permit. Therefore, suppliers should be permitted to utilize QR codes in addition to a short-form warning to provide information regarding alleged disputes regarding the toxicity of a particular chemical or quantify the risk of the exposure. The use of QR codes in addition to short-form warnings could also be used to provide the full list of all listed chemicals present in a product.

Given that Proposition 65 was passed by California voters due to their concern about being exposed to toxic chemicals in the water they drink, the air they breathe, the products they use and the food they eat, we are enthusiastically in favor of this effort to afford consumers their legal right to know. Thank you for the opportunity to provide these comments.

Respectfully,

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# Exhibit A

# Office of Environmental Health Hazard Assessment

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January 8, 2002

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**Re: Methyleugenol**

Dear Gary:

Thank you for your letter of December 21, 2001, concerning the application of 22 CCR § 12501 to methyleugenol.

I understand from assertions in your letter that basil and other natural herbs and spices contain methyleugenol (CAS No. 93-15-2) as a natural constituent, and that naturally occurring methyleugenol may be separated from other constituents of basil through various chemical or physical processes. Your letter also contains representations that the separated methyleugenol has the same chemical identity (i.e., CAS number) as the methyleugenol found in the natural sources. This letter relies upon these assertions and representations, and applies only to the extent such assertions and representations are accurate.

As a natural constituent of basil and other natural herbs and spices, methyleugenol is a "naturally occurring" chemical within the meaning of 22 CCR § 12501.

Methyleugenol is a food within the meaning of 22 CCR § 12501 because it is used to flavor jellies, baked goods and other items. See Californian Health & Safety Code § 109935(a) ("'Food' means . . . : (a) Any article used or intended for use for food, drink, confection, condiment, or chewing gum by man or other animal."). Further support for the status of methyleugenol as a food can be found in the Food Chemicals Codex, 4th Edition (1996), which recognizes methyleugenol as a flavor chemical. Methyleugenol also is a natural constituent of food within the meaning of 22 CCR § 12501 because it is a natural constituent of basil, a food.

You further have asserted that methyleugenol found in natural herbs and spices results from the natural process of plant growth, not from any known human activity that would alter its "naturally occurring" status. Nor does the action of adding methyleugenol to another food or consumer product constitute "human activity" within the meaning of 22 CCR § 12501(a)(3).

The Final Statement of Reasons for 22 CCR § 12501 explains "it is evident from the regulation as a whole that once a chemical is exempt as a naturally occurring chemical in food, the exempt status of that particular chemical will 'carry over' to any other food to which it is added. Subdivision (b) provides that this exempt status will even 'carry over' to other consumer products." Final Statement of Reasons for Section 12501 at 9. Thus, adding methyleugenol to another food or a consumer product does not create an "exposure" within the meaning of 22 CCR § 12501 when that food or consumer product is consumed or used.

Because methyleugenol is a food, not a "chemical contaminant," 22 CCR § 12501(a)(4) does not apply.

Thus, any methyleugenol found in or separated from basil leaves or other natural herbs or spices does not cause an "exposure" for purposes of Health and Safety Code section 25249.6 when consumed in food or when found in a consumer product. Since no exposure arises from consuming naturally occurring methyleugenol in food or from naturally occurring methyleugenol in consumer products other than food, the warning obligation of Proposition 65 would not apply to naturally occurring methyleugenol.

Sincerely,

Colleen Heck

Colleen Heck
Chief Counsel