



April 8, 2015

Ms. Monet Vela
Office of Environmental Health Hazard Assessment
P. O. Box 4010
1001 I Street
Sacramento, California 95812-4010

via email to P65Public.Comments@oehha.ca.gov

Re: Coalition Comments on OEHHA's Proposed
Clear and Reasonable Warning Regulation and Website Regulation

Dear Ms. Vela:

We, the undersigned organizations, write on behalf of a broad coalition representing makers of a wide range of consumer and building and construction products. We appreciate the opportunity to comment on the proposed California Safe Drinking Water and Toxics Enforcement Act of 1986 ("Proposition 65") regulatory reforms. In short, we submit focused comments to express our strong opposition to three key elements of OEHHA's current proposals to its implementing Proposition 65 regulations. None of these elements should move forward, and they should be removed now from the proposal: the "List of 12" proposal that would create a "superlist" of chemicals wrongly singled out for special, "scarier" treatment on Proposition 65 warning labels; the proposal to create and expand a special website that puts the California government in the untenable position of appearing to be the authority for consumers with questions about safety, instead of the product manufacturers themselves; and a counterpart "no dilution" provision that would prohibit those same manufacturers from communicating accurate and truthful information about the safety of their products. While many of our signatories are also filing separate comments and/or are signing on to the California

Chamber of Commerce's coalition comments, we greatly appreciate your careful consideration of our supplemental comments here.

“List of 12”

OEHHA has expressed concern about what it calls “overwarning,” which seems loosely to translate into worry that the public is so saturated with Proposition 65 warnings that warnings are being entirely disregarded. We appreciate that the OEHHA’s “List of 12” proposal seems to be an attempt to fix this. Apparently OEHHA believes the problem will be solved if it can attract more attention to certain warnings by picking certain chemicals for special treatment because consumers already recognize those chemicals, and better yet, are already frightened of them due to the campaigns of advocacy groups and hostile media coverage. We believe the concept is fundamentally problematic as proposed, and more, that that it would be virtually if not literally impossible to establish scientific criteria that would justify selection of certain chemicals as warranting special treatment.

The “List of 12” Proposal Fails to Solve the “Overwarning” Problem at its Root.

This approach has two serious flaws. First, OEHHA’s “overwarning” concern is due to agency action and inaction itself as well as the implementation of the law. Proposition 65 was apparently intended only to cover a very small class of chemicals definitely known to the state to cause cancer or reproductive disorders. As the ballot materials insisted, “[c]hemicals that are only suspect are not included.” And insisted further, “chemicals already listed as known carcinogens (by NTP and IARC)” are those which, at a minimum, must be included. This original intention has apparently been lost, with the Proposition 65 list ballooning to cover almost 900 chemicals instead of the (apparently) few dozen that were originally intended. It has been twisted and contorted with a bias to adding chemicals to the list, so that many more chemicals are on the Proposition 65 list than those chemicals that are known to cause cancer (NTP Group 1 and IARC Group 1). Even the American Cancer Society has felt the need to point this out: “not all [of the chemicals listed on Proposition 65] are known carcinogens (known to cause cancer) by groups and experts outside of the state of California. This means that not every compound labeled as a possible cancer-causing substance has been proven to the worldwide scientific community to actually cause cancer.”¹ OEHHA could be said to have created what it calls an overwarning problem itself because it overlisted well beyond what was intended when Proposition 65 passed.

To fix the perceived “overwarning” problem, OEHHA now proposes cherry-picking a “List of 12” chemicals to get consumers to pay attention. It proposes picking the “List of 12” chemicals not based on any kind of science about the actual risk they may present to consumers, but based on the chemicals it thinks consumers already recognize (and are already afraid of, or already think – right or wrong – are “bad.”). Consumer “recognition” is not a rational, scientific way to decide which chemicals – and which products – deserve a stronger warning or need to gain more attention capture.

Second, OEHHA has never figured out how to fix a critical design flaw in the statute (perhaps because it has no legal authority to do so). At bottom, the statute requires consumers to be notified in advance if they are to be exposed to certain chemicals in a product or facility. Had it been left there, the statute might have supported a simple, “ingredient list” style notification

¹ <http://www.cancer.org/cancer/cancercauses/othercarcinogens/athome/cancer-warning-labels-based-on-californias-proposition-65>

requirement. But the notice is called a “warning” in the statute, so OEHHA and the courts have taken the position that the “warning” must therefore be issued, regardless of whether a “warning” is justified based on actual health risk. And the statute has been read to require the warning to be about the presence of things that sound frightening – carcinogens and reproductive toxicants. As a result, the warnings mandated by the statute begin to fail, courtesy of human psychology (and the inadequacy of the information being communicated). When people are warned about products with which they are familiar, which they use or consume safely every day, and which common sense and experience tells them are safe; when people aren’t given the critical information they need to know whether a product is safe to use or not; when risk and benefit information are not clearly communicated, people disregard the warning:

Warning labels that warn against any infinitesimal risk are essentially useless. The outbreak of warning labels spawned by Proposition 65 is so widespread that consumers are being conditioned to ignore them. Even if some of these labels are trying to warn us against a legitimate risk, we are likely to ignore them since these labels “cry wolf” more often than they protect us.²

Singling out certain chemicals for special treatment, however, is not a practical or effective fix to the problem. If human health risk must be considered product by product, taking exposure into consideration, then selecting a chemical or class of chemicals for a universal superwarning in all products all the time regardless of exposure and risk is flawed on its face. We urge OEHHA to retract this proposal.

OEHHA Has No Statutory Authority to Create a “List of 12.”

Beyond practical flaws, the List of 12 is burdened by several fatal legal flaws. OEHHA has no statutory authority to create a secondary, regulatory superlist for special treatment or differentiated warning labels. Proposition 65 provides for chemicals either to be “on the list” or “not on the list.” There are no rankings or tiers. There is no comparative risk analysis. And the proposal is not needed to implement Proposition 65 or effectuate its purposes.

But even if OEHHA did have statutory authority to create a “List of 12,” its proposal here is entirely arbitrary and would fail in a legal challenge. OEHHA did not select the chemicals for the “List of 12” on the basis of any rational criteria. It conducted no risk assessment. It did not disclose the basis for its chemical selection or criteria in the pre-regulatory proposal; its disclosure now (and retention of most of the chemical in the pre-regulatory proposal) suggests that it selected criteria after the fact to justify chemicals that it had previously, arbitrarily picked with no criteria at all. It conducted no external peer review.

OEHHA says it picked chemicals based on basis of consumer “recognition” of certain chemicals, which is arbitrary on its face. It cannot be assumed that consumers will have better attention capture (the first stage of the processes involved in attention to warnings) and maintenance (the second stage of the processes involved in attention to warnings) merely because they are already familiar with a word to be added to a label, nor can it be assumed that mere familiarity with a word justifies seeking additional attention for a warning label.³ Likewise, it claims to have picked chemicals based on “recent Proposition 65 enforcement activity.” It is

² <http://consumerist.com/2008/07/21/do-warning-labels-on-flashlights-really-mean-anything/>

³ For that matter, OEHHA points to absolutely no data to suggest that it tested or relies on test data that confirms what consumers do or do not “recognize” with respect to chemicals on the “List of 12,” the remainder of the chemicals on the Proposition 65 list, and chemicals not on the Proposition 65 list.

well known, however, that the vast majority of enforcement actions are not selected and brought by the agency itself against any designated criteria.⁴ They are brought by private “bounty hunters,” who may, and do, use any criteria they wish, and may, and are, as arbitrary as they wish. At best, it might be argued that the number and recency of bounty hunter suits further increases the public’s “recognition” of affected chemicals,⁵ but we have already established that this criterion is entirely arbitrary (and a bit of circular logic) as the basis for a superlisting or warning that merits or is intended to attract additional attention.⁶

OEHHA has not adequately defined what it means by “widespread prevalence” or “potential for significant exposure,” and appears to have made conclusions on a chemical-by-chemical basis rather than a product-by-product basis, such that “List of 12” warnings could occur on products or in facilities where these criteria are not met at all. In neither case does OEHHA tie exposure or potential exposure either to hazard or to specific products, so risk-based conclusions are never made. As a result, warnings will not be delivered on the basis of actual risk, so the warnings will have no value or meaning in accordance with warning, risk communication, and human perception science.

OEHHA also claims that it used “the general availability of additional authoritative information and resources for the public” as the basis for selecting the “List of 12.” Again, we can discern no reasonable basis for this criterion. The availability of additional information means that OEHHA has more places to which it can refer consumers with questions; it does not create a basis justifying superlisting. For that matter, the mere existence of information on how to reduce exposure to a particular chemical from one source has no nexus or rational connection to creating a new requirement for the manufacturer of a consumer product to have to “superlist” that chemical on the product warning.

We also note that OEHHA offers a “list of scientific references” upon which it says OEHHA relied in its selection of chemicals for the “List of 12.” Upon review, however, the list of references appears in many cases to be incomplete, outdated, reflecting the wrong health endpoint(s), reflecting the wrong chemical entirely (not the chemical listed on Proposition 65), lacking exposure and risk information, and largely divorced from specific consumer products and facilities. OEHHA never explains how it reviewed these references, or what scientific criteria it used to review these references. It never explains what references were reviewed and compared against the “List of 12,” for that matter, to justify selecting the 12 chemicals. The mere inclusion of a “list of scientific references” by OEHHA does not establish any reasonable or scientific basis for selection chemicals for the “List of 12.”

There is neither practical, policy, nor legal basis for the “List of 12” proposal. It should be removed immediately from the proposed regulation, and we urge OEHHA to do so.

⁴ It is well known because the California Attorney General tracks these lawsuits in detail. <http://oag.ca.gov/prop65>

⁵ We say “at best” because OEHHA never establishes in the administrative record that consumers are familiar with bounty hunter suits and the chemicals at issue in the first place – or that consumers who do bother to track bounty hunter suits are not already “familiar” with a chemical for some other reason.

⁶ It should not be lost on OEHHA that if its presumed plan were to work, and suddenly consumers paid more attention to warnings including the “List of 12” chemicals and (wrongly) believed them to be of greater hazard or risk, that consumers would presumably pay less attention to or begin ignoring every other warning/label that did not include a “List of 12” chemical by name. The administrative record shows no thought or study of this consequence, however, whether cost/economic burden or otherwise.

“No Dilution” Provision

OEHHA has proposed that although “supplemental” information to the warning may be offered by a regulated business, the supplemental information “may not contradict, dilute, or diminish the warning.” This is going in the wrong direction. Consumers need and deserve accurate and truthful, contextual information about the safety of consumer products they use and consume every day.

OEHHA should either remove this provision outright or replace it with clarification that truthful, accurate supplemental information from the manufacturer (or other regulated entity) is always permitted, and supplemental information that puts risk into context and communicates product benefits is encouraged. And policy aside, it is likely a First Amendment violation for OEHHA to circumscribe or prohibit manufacturers from offering helpful, truthful product information to consumers.

“Website” Proposal

Our comments above point to the importance of complete, contextual, risk-based information to inform public health. To the extent that OEHHA is not authorized to deliver this information or require its delivery, it should not impede manufacturers from doing so. Beyond asking ourselves what information can or should be offered to consumers, however, we must also ask who should do so.

The website proposal gets the answers to both of these questions wrong. As proposed, an agency-administered website will not be helpful to consumers and cannot inform decisions about purchase or use of consumer products. Consumers advised of a hazard and instructed on how to reduce exposure necessarily will be left either completely confused about product safety or convinced that products are unsafe and that they must reduce their exposure lest one of the threatened health outcomes materialize. OEHHA never indicates that it will offer useful, accurate information to consumers – risk-based information, benefits information, and alternatives information. For that matter, its focus remains 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. To answer questions like - is coffee good for me? is red wine good for me? if so, how much? -- consumers need to know more than that the product happens to contain a chemical listed on Proposition 65.

The second question – who should be the purveyor of information – is equally important. Certainly, government entities can and do provide useful information to consumers about the safety and safe use of consumer products. But the best place to start is generally with the manufacturer. Importantly, manufacturers have existing obligations related to safety information, content information, chemical disclosure, allergen disclosure, safety precautions, labeling, and otherwise. When it comes to product safety and safe use, it is critically important that consumers remember to consult the manufacturer’s label, safety instructions, warnings, personal protective equipment recommendations, and use instructions (like ventilation). 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. Indeed, OEHHA does this now in its Proposition 65 Q&As:

Q: Is a product safe if it carries a Proposition 65 warning? A: The purpose of Proposition 65 is to notify consumers that they are being exposed to chemicals that are known to

cause cancer and/or reproductive toxicity. Consumers can decide on their own if they want to purchase or use the product. A Proposition 65 warning does not necessarily mean a product is in violation of any product-safety standards or requirements. For additional information about the warning, contact the product manufacturer.” (Emphasis added).⁷

This is particularly critical for products that must be handled in a particular manner or where improper use may result in first aid requirements. It does little good for a consumer who needs immediate first aid instructions involving a leaking car battery to be spending time wading through website information about chronic exposures to lead. Warning experts advise that the most important safety information should also be the most prominent.

We also note that OEHHA has no statutory authority to require manufacturers or others (affected businesses under the statute) to provide information to OEHHA for inclusion on the website. Any sort of mandate must be removed or face legal challenge as ultra vires. We suggest instead that OEHHA refer questions first to the product manufacturer, and secondarily may offer references to information already collected and maintained by a host of federal agencies and California itself through the California Safer Consumer Products (“Green Chemistry”) program. We further urge OEHHA not to require the “Proposition 65” URL on labels, which could compete to the detriment of much more important URLs or phone numbers offered by a manufacturer, such as a poison control hotline number on antifreeze or an allergy hotline number on a food product.

“Warning Symbol” Proposal

OEHHA also proposes that a special symbol – a triangle with an exclamation point in it – be added to Proposition 65 product warnings. We believe this will contribute to the “overwarning” problem about which OEHHA is concerned. Worse, the symbol is already in use in many other contexts, so it is unclear whether consumers will simply be more confused to see it added to Proposition 65 labels. We encourage OEHHA to focus more on the substantive content of warnings, and to consider that adding a symbol will serve merely to “shout louder” when merely a quiet whisper is in order and more in line with actual health risk.

We also urge OEHHA to carefully consider how consumers will interpret the proposed symbol together with a narrative Proposition 65 warning before any regulation is finalized, and to conduct any necessary consumer focus group testing to confirm perception and understanding of the warning (the narrative text, the symbol, and both together). If the symbol is confusing, misunderstood, or unnecessarily elevates the warning based on this evidence, the symbol should not be used. If OEHHA chooses not to conduct this review, the symbol should be removed from the proposal as unsupported by any evidence in the administrative record.

We appreciate the opportunity to comment on OEHHA’s proposal. Should you have any questions, please contact me at 916-448-2581 or tim_shestek@americanchemistry.com

⁷ <http://www.oehha.ca.gov/prop65/p65faq.html>

Sincerely,



Tim Shestek
American Chemistry Council

On behalf of the following organizations:

Adhesive and Sealant Council
American Architectural Manufacturers Association
American Coatings Association
American Wood Council
Asphalt Roofing Manufacturers Association
Auto Care Association
Chemical Fabrics & Film Association, Inc.
Composite Panel Association
Copper & Brass Fabricators Council
Fashion Accessories Shippers Association
Halogenated Solvents Industry Alliance, Inc.
Institute of Makers of Explosives
IPC - Association Connecting Electronics Industries
Kitchen Cabinet Manufacturers Association
National Association of Chemical Distributors
National Pest Management Association
North American Metals Council
Sika
SPI: The Plastics Industry Trade Association
Specialty Steel Industry of North America
Styrene Information Research Council
The Vinyl Institute
Travel Goods Association
Vinyl Siding Institute