

Comments of Joseph H. Guth
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To

OEHHA
Developmental and Reproductive Toxicant
Identification Committee
Public Meeting on Bisphenol A
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My name is Joseph Guth. I am the Legal Director of an NGO called the Science and Environmental Health Network (www.sehn.org). Besides being a lawyer, I also have a Ph.D. in biochemistry.

I want to discuss the legal aspects of the decision you are making today. It's a complicated decision because it contains elements of both science and law. You have heard that other governmental bodies have made decisions about BPA. But keep in mind that each law governing such decisions has its own purposes and entails its own criteria and balance of interests. Some of those decisions on BPA may be helpful to you and others may not be.

Turning to Proposition 65, as you know it can result in placement of warnings on products. But today you are not deciding whether products must contain warnings, whether BPA is useful, whether BPA should be regulated or whether its benefits outweigh its costs. Those issues are not relevant to your decision today and some are completely irrelevant to Proposition 65.

You are being asked by the people of California, who voted for Proposition 65, simply to make a threshold decision in the legal process created by that law. That is:

*Whether BPA has been **clearly shown** through scientifically valid testing according to generally accepted principles to cause reproductive toxicity.*¹

Let me focus on the words “clearly shown.” Those two words establish the level of scientific certainty that Californians decided is appropriate for listing a chemical under Proposition 65.

But what do they mean, exactly? Laws use different standards of certainty depending on what they are trying to accomplish. The most common standard used in civil cases is “preponderance of the evidence.” It means 51% of the evidence – in civil cases the party with the best case wins, even if it’s only by a hair.

Another standard you know is the criminal one of “beyond a reasonable doubt.” This is a very high standard. It requires the government to eliminate every reasonable doubt to obtain a conviction. A doubt is reasonable if a reasonable person could believe it, even if you don’t believe it yourself. If there is a reasonable doubt as to a defendant’s guilt, then the jury should not convict.

“Clearly shown,” the standard you must apply today, is somewhere in between. It is similar to another common legal standard called “clear and convincing evidence.” It is a fairly high standard. But it is not as high as “beyond a reasonable doubt.” It admits of some uncertainty, some conflicting evidence, some doubt. It even allows there to be a reasonable doubt.

This means that once you look at all the evidence, you can find BPA should be listed even if you also can see that a reasonable person could disagree. The “clearly shown” standard does not require that the decision to list BPA be the only reasonable decision.

¹ California Health and Safety Code, Section 25249.8(b); Cal. Code of Regs. Section 25305(b)(1).

If you look at the OEHHA Guidance document identifying listing criteria,² you will see it does not require certainty and recommends various ways to resolve conflicting evidence.

There can be good reasons for the law to list a chemical even if there is a reasonable doubt. Proposition 65 reflects a concern with the downside of failing to act once a danger becomes “clearly shown.” Using too high an evidentiary standard risks false negatives and harm to public health. Using the “clearly shown” standard allows California to start a process that can protect public health even where there is some residual doubt.

In conclusion, then, California is asking you to apply the legal standard of “clearly shown”. It would not be appropriate for you to apply a different standard, even if you use it personally as a scientist. It is entirely possible for you to think that further experimentation is needed to remove all doubt about whether BPA is a reproductive toxin, and yet at the same time to conclude that BPA has met the legal standard for listing under Proposition 65.

If you are uncertain about this, I’d urge you to seek clarification from OEHHA’s general counsel, Carol Monahan-Cummings.

Thank you for your attention.

² “(Nov. 1993) Criteria For Recommending Chemicals For Listing As ‘Known To The State To Cause Reproductive Toxicity,’” available at: http://oehha.ca.gov/prop65/policy_procedure/.