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Monet Vela
Office of Environmental Health Hazard Assessment
P.O. Box 4010
1001 I Street
Sacramento, CA 95812-4010
Via Electronic Mail Only: P65Public.Comments@oehha.ca.gov

Re: OEHHA’s Pre-Regulatory Proposal to Amend Proposition 65 Warning Requirements

Dear Ms. Vela:

The American Coatings Association (“ACA” or “Association”) submits these comments to the California Environmental Protection Agency, Office of Environmental Health Hazard Assessment (“OEHHA” or “Agency”) on the proposed California Safe Drinking Water and Toxic Enforcement Act of 1986 (“Prop 65”) reforms. Prop 65 litigation reform is sorely needed and ACA supports efforts to accomplish this goal. Our comments are focused primarily on the proposed additional “clear and reasonable” warning requirements – requirements that the Association believes are more likely to increase, rather than decrease, frivolous Prop 65 litigation.

ACA is a voluntary, nonprofit trade association representing approximately 250 manufacturers of paints, coatings, adhesives, sealants, and caulks, raw materials suppliers to the industry, and product distributors. The manufacture, sale, and distribution of paints and coatings are a $20 billion dollar industry in the United States. ACA’s membership represents over 90% of the total domestic production of paints and coatings in the United States. The state of California currently represents approximately 18% of our domestic coatings market. ACA represents 15 paint and coatings manufacturers with locations in California. The paint and coatings industry, including manufacturers and retailers, employs over 31,000 workers in the state of California. Our members’ manufacturing, distribution and retail operations in California provide a living for hundreds of Californians. Our members have also been repeated targets of frivolous Prop 65 lawsuits, hampering our ability to do business in California.

The Association has been an active proponent of Prop 65 reform and applauds efforts to improve warnings provided to the public. According to OEHHA’s “Initial Statement of Reasons,” these regulatory amendments attempt to “provide more guidance concerning acceptable methods for providing warnings to consumers and acceptable warning content,” and to create certainty for affected businesses. As written, however, the additional warning requirements in the current pre-regulatory proposal will do little to increase safety and decrease exposure – the ultimate goals of Prop 65.

Rather, the additional warning requirements as proposed will instead duplicate federal and state law, create confusion in the marketplace and give rise to exorbitant compliance and litigation costs.

ACA also endorses and incorporates herein by reference the comments of the California Chamber of Commerce (“Cal Chamber”). The Cal Chamber’s comments highlight the shared concerns that ACA and many industries have that these proposed reforms will only escalate the already abusive litigation climate, do little to appropriately inform the public, create confusion for both businesses and consumers, and impose crippling compliance costs for
businesses across the country. Accordingly, ACA strongly urges OEHHA to carefully consider and fully respond to ACA’s and the Cal Chamber’s suggestions and comments.

COMMENTS

The following comments are meant to address specific proposed requirements under the pre-regulatory proposal. In many cases, our comments focus on the twin regulatory objectives from the Governor’s office of (1) reducing unnecessary litigation and (2) improving warnings to the public. In other cases, our comments seek to provide input on the practical challenges that would arise from implementation of the proposed changes, including costs of compliance and the increasingly difficult challenges of meeting district, state, federal and international warning requirements. Given the constraints of time and space and the scope of the proposed changes, we have not addressed every issue of concern to our membership but have tried to highlight some of the more pressing challenges introduced by the pre-regulatory proposal.

Section 25602—Definitions

ACA supports the Cal Chamber’s objection to OEHHA’s proposed inclusion of the phrase “requiring a warning” to the definitions of “consumer products exposure,” “environmental exposure” and “occupational exposure.” This proposed amendment is among the many in this pre-regulatory proposal that is likely to increase litigation because it essentially removes an existing “safe harbor” in the law by requiring a business to be able to provide a detailed justification for any Prop 65 warning applied to a product. As the Cal Chamber notes, the difficulties and expenses to determine exposure levels from use of a product coupled with the risk of being subject to litigation for using warnings when they may not be required will impose a substantial burden for businesses. It will inevitably increase bounty hunter lawsuits because plaintiffs could argue that a warning is not “clear and reasonable” because the presumed exposure is not at a level “requiring a warning.”

Section 25604 – Lead Agency Website

From comments made at public hearings, it is apparent that OEHHA does not fully appreciate the unintended consequences of its proposed lead agency website. ACA refers OEHHA to the comments of the Cal Chamber on this issue, which illustrate how a website of information on chemicals will do little more than increase the threat of frivolous litigation, as bounty hunter litigants review online information for potential targets. While these hypothetical scenarios may seem farfetched on the surface, in fact they serve as a very real reflection of the kind of frivolous Prop 65 lawsuits our members face on a regular basis. In effect, the website would facilitate the very rise in litigation the Governor seeks to remedy through Prop 65 reform.

ACA is also concerned that OEHHA may not fully appreciate the costs and complexities of setting up its proposed public website. OEHHA is asking companies to submit information on 11 separate parameters for countless individual products. All of this information would need to be assimilated into a constantly evolving website, generating massive upfront and ongoing maintenance costs. Given the marginal benefit to the public and the unintentional effect of increasing, rather than decreasing Prop 65 litigation, these costs cannot be justified. At a minimum, OEHHA must provide a realistic estimate of these costs to better inform decision makers about the scope of such an undertaking.

Finally, OEHHA may not fully appreciate the complexities of obtaining information on chemical components in raw materials, particularly at the de minimis levels it proposes to require for its website. Product manufacturers rely on their suppliers for information on chemical components. Those suppliers provide information obtained from their suppliers, and so on. Often, the information on chemical components is limited by analytical constraints or operative regulatory thresholds that apply to disclosure documents such as Safety Data Sheets (SDS), which are
controlled by Federal standards. Thus, a well-intentioned product manufacturer may not have information about every chemical component at the infinitesimal levels OEHHA would now require to be disclosed. While this is not likely to affect consumers, as the exposures would be well below biologically relevant levels, it would provide ammunition for bounty hunter litigants who aim to sweep private parties into “gotcha” lawsuits. Again, this is an illustration of how the conceptually noble goal of providing warnings to the public will in fact become a vehicle for further litigation.

In addition, requiring this level of information disproportionately affects chemical product formulators, such as the paint and coatings industry. Our industry buys raw materials from larger suppliers, often outside of California, who are not required to label under Prop 65 but must only adhere to the disclosure requirements set forth by the U.S. Occupational Safety and Health Administration (“OSHA”). Often, the paint and coatings industry buys formulated products, such as resins, from suppliers, who again only comply with the OSHA disclosure levels. Considering the complexity of our supply chain, the lead agency website concept places an unachievable mandate for any company placing formulated products into the marketplace.

Furthermore, much of the requested information (items 4, 5, 8, and 9 under Section 25604 of the March 7, 2014 pre-regulatory proposal) may not be in the control of the manufacturer. While labels may state recommended uses, end-users may use products in ways not known to the manufacturer. This conflict could leave both parties at risk of unnecessary litigation if a customer adopts an unsupported use. Other requested information (items 10 and 11) is duplicative of requirements for labels and SDSs under the Hazard Communication System (“HCS”) and/or Federal Hazardous Substances Act (“FHSA”).

OEHHA’s proposal to require the disclosure of specific chemical identity on the proposed website (and in some cases, the label) is subject to a host of legal issues, namely, trade secret concerns, confidential business information, and the ability of both domestic and foreign competitors to misappropriate the intellectual property of companies doing business in California.

The website requirement also imposes a significant cost burden on coatings manufacturers while providing an unclear public health benefit. The coatings industry produces a large number of similar products with small variations in the type and amount of tint or colorant. For example, a line of wood stains may consist of 20 different colors each produced in three levels of opacity (e.g. transparent, semi-transparent and opaque) for a total of 60 unique product entries. For products such as this, which carry no appreciable difference in public health risk, entering this information will require a significant cost and time investment by product manufacturers with no appreciable benefit to the public.

In summary, we believe that requiring manufacturers of chemical products to continually provide information to OEHHA to submit SDS information to populate a website is both expensive and inconsistent with federally mandated requirements. The state of California would also incur significant, on-going costs with marginal benefit to the public. ACA encourages OEHHA to abandon the proposed lead agency website. The public already has ready access to product information through labels, safety data sheets, product literature, and numerous online repositories of health and product information which provide the public with adequate warnings at the point of sale. The nominal benefits provided by the proposed lead agency website would be swamped by the exorbitant costs of implementation and the further encouragement of bounty hunter lawsuits.

Simply put, the cost-benefit equation does not support adoption of a lead agency website. It is ACA’s position that OEHHA should drop the proposed website and allow the Safety Data Sheet and product labels to be used to provide detailed safety information to both consumers and industrial users.
Section 25605 – Chemicals, Substances or Mixtures that Must be Disclosed

The pre-regulatory proposal’s new requirement for manufacturers to list the 12 chemicals proposed in Section 26505 on a Prop 65 warning label is arbitrary, unnecessarily costly, and fails to provide any tangible public health benefit. Furthermore, it would confuse consumers who already face a bewildering array of legally mandated warnings.

Significantly, OEHHA has provided no rational, science-based selection criteria for the initial list of chemicals. In fact, during the public workshop held on April 14, 2014 between stakeholders and OEHHA staff, representatives from OEHHA acknowledged the lack of science-based listing requirements and instead suggested that these 12 chemicals were chosen because they were already commonly labeled under Prop 65 and would be easy for the public to recognize. This acknowledgement confirms that the selection process was not driven by pressing public health concerns, which makes the proposal unsupportable given that it will likely increase Prop 65 lawsuits.

Furthermore, if consumers are already being warned about these chemicals, why does OEHHA need to change the warning requirement? While the claim that the public is familiar with such chemical names as “1,4-dioxane” or “phthalate” is questionable on its face, and even if true, it is most likely a reflection of a public perception of harm arising from misinformation about those chemicals. Merely identifying a chemical name on a product label does not provide the consumer with appropriate information about the health risks that may or may not be associated with that chemical—again, failing to meet the Governor’s goal of improving warnings for the public.

Finally, the proposed chemical identity requirement will create immense waste as product manufacturers will be forced to continually re-label their products. Simple product reformulations may require wholesale label changes. Label changes may be required if suppliers alter the components or change the disclosure level of their raw materials. Even product changes designed to reduce environmental impacts will incur additional costs associated with label changes. And of course, if OEHHA opts to add additional chemicals to the disclosure list, further label changes will be required. For products with extended shelf-lives, such as paint, an evolving list of chemicals to be disclosed will be particularly burdensome.

Due to the multitude of issues regarding chemical specific Prop 65 warnings, ACA encourages OEHHA to abandon chemical specific labeling and maintain the current labeling requirement under Prop 65.

Section 25607.1-2 – Warnings for Consumer Products Other Than Food

Contains vs. Expose

In its pre-regulatory proposal, OEHHA proposes to change the warning statement from “This product contains a chemical known to the State of California...” to “Using this product will expose you to xxxx, a chemical known to cause cancer, ...” This change is problematic in that it is too definitive and misleading to the public. If the manufacturer’s precautions and recommendations for personal protective equipment are followed, an actual exposure can be avoided. Further, not all uses of products will result in exposure, particularly if the chemical of concern is bound in a matrix. Thus, the existing language “contains” a certain chemical is more appropriate than “will expose you” to a certain chemical.

In section 25607.2(a)(2)(A-C) of the “Initial Statement of Reasons” (page 19), OEHHA states “warnings are not required where a product simply ‘contains’ a listed chemical but may not actually have the potential to cause an exposure.” This statement suggests that OEHHA believes this will clarify when labeling is actually required; however, in practice manufacturers have been driven to provide the warning without establishing any clear indication of risk (i.e. exposure). In reality, this provision is a prescription for additional litigation and directly interferes with the Governor Brown’s goal of reducing unnecessary litigation.
Confusion with Federal Occupational and Consumer Product Labeling Regulations
Currently, various federal laws require hazard labeling and warning information on products. The proposed Prop 65 additional warning requirements would duplicate already effective federal hazard labeling and warning requirements.

The Consumer Product Safety Act (“CPSA”) and the FHSA, which are implemented by the U.S. Consumer Product Safety Commission (CPSC), provide for federal authority to require nationwide warning statements or instructions for consumer products under its jurisdiction. The CPSC already requires the chemical manufacturer to list specific chemicals that contribute substantially to the product’s hazard. In addition, manufacturers must assess the risk of chronic hazards resulting from the use of the product.

In the industrial setting, OSHA has comprehensive requirements regarding labeling by employers of hazardous chemicals in the workplace. When OSHA’s revised Hazard Communication Standard (HCS,) which adopted the Globally Harmonized System of Classification and Labeling (GHS), which becomes fully implemented on June 1, 2015, the proposed increased warning content will already be included in federally mandated Safety Data Sheets (formerly referred to as Material Safety Data Sheets). Although SDSs are only required for products subject to HCS 2012, SDSs are typically made available to anyone who request them, either online or at the retail point of sale.

The SDS content and the entire GHS was negotiated in a multi-year process by hazard communication experts from many different countries, international organizations, and stakeholder groups working under the auspices of the United Nations (UN). It is based on existing major labeling systems around the world. The GHS is regarded, worldwide, as the most effective and prescriptive labeling system, which takes a modern approach to warn both consumer and industrial users. This system is based on classifications, all of which have standardized hazard and precautionary statements required for the product label. This standardization process requires the following label statements for hazardous chemicals classified as Carcinogens and Reproductive Toxicants:

1. May cause cancer (or reproductive harm) <...>. <...> (state route of exposure if no other route of exposure cause the hazard.)
2. Obtain special instructions before use.
3. Do not handle until all safety precautions have been read and understood.
4. Use personal protective gloves/protective clothing/eye protection/face protection. Chemical manufacturer, importer, or distributor to specify type of equipment, as required.
5. If exposed or concerned: Get medical advice/attention.

The clear and concise statements listed above for carcinogens and reproductive toxicants, coupled with the SDS, provide a more in-depth system of warnings than the proposed warnings outlined by OEHHA. Given that the SDS already includes the enhanced warning information proposed by OEHHA, and is available to both consumers and workers, this proposal by OEHHA is unnecessary and redundant.

Furthermore, OEHHA’s arbitrary use of a GHS mandated hazard symbol is likely to confuse both workers and consumers. The requirement to place pictograms and/or hazard statements on product labels using the GHS is based on specific and globally standardized hazard classification criterion. In the case of carcinogens and reproductive toxicants, the criterion differs drastically from the binary system used to consider listings under Prop 65. Under the proposed amendments, Prop 65 would require use of the “Health Hazard” hazard symbol while careful use of the GHS classification system would not trigger use of the same pictogram anywhere the GHS has been implemented around the globe. In short, requiring contradictory labels will cause confusion in the workplace and associated markets.
When OSHA adopted the Revised HCS implementing the GHS, OSHA required extensive worker training regarding the use of pictograms. Prior to the adoption of the Revised HCS, pictograms had never been used in the U.S. marketplace. OSHA acknowledged this change and required employers to develop the necessary training programs to ensure the move to pictograms did not impact safety. Without proper education, the average worker, especially outside of California, will be confused by the potential conflict with or duplication of the mandated GHS warnings under the HCS. Consumers will not recognize the meaning of the pictogram on a typical consumer product. We believe that the confusion that will surround the use of the GHS pictogram will render it meaningless.

Lastly, with this abundance of label content, product labels have become cluttered with small print. The additional language is certain to make labels more confusing for employees to understand and consumers to read and make informed purchasing decisions. Considering label space constrictions, it seems counterproductive to the “clear and reasonable” legislative mandate to require duplicative and potentially confusing information as proposed by OEHHA.

As a practical matter, given that Prop 65 requires OEHHA to update the Prop 65 List at least once per year, requiring companies to create chemical specific labels in order to comply with these changes is prohibitively costly and time consuming. The paint and coatings industry estimates that the proposed changes to the warning requirements could cost companies millions of dollars in labeling and website maintenance costs, without a measurable improvement in public safety. The paint and coatings industry is a batch based industry. As stated above, paint is a unique consumer product in that it typically has a long shelf life. The proposal would require paint manufacturers to not only change their labels for new products but also change labels on all products remaining in the supply chain. This would be a significant undertaking with high costs to our industry and the potential for waste. Without a clear sell through period based on a manufactured date, which protects industry from litigation, requiring chemical specific labels is simply unworkable.

Additionally, in the event that a manufacturer receives information that a raw material may contain a Prop 65 listed chemical and makes a decision to warn, the proposal requires that the website be updated within 30 days of the decision. In most cases, it is not feasible to design, print and enter production with a new label within a month. The disconnect in timing between publication on the website and the ability to actually implement a label revision leaves a manufacturer vulnerable during this transition to “failure to warn” litigation.

And finally, the proposal to include the specific chemical identity on a Prop 65 label is subject to a host of legal issues, namely, trade secret concerns, confidential business information, and the ability of both domestic and foreign competitors to misappropriate the intellectual property of companies doing business in California and in the United States.

Conclusion

Products sold throughout the state of California now bear Prop 65 warnings that are easily recognized by consumers. However, Prop 65 has also given rise to a cottage industry of bounty hunter litigation with millions of dollars being spent on frivolous litigation with little, if any, benefit to the public at large. Clearly Governor Brown recognized the need for change when he recommended changes to reduce frivolous Prop 65 litigation and improve warnings for dangerous chemicals. OEHHA’s proposed changes to Prop 65 will not help to achieve, and in fact, directly conflict with the intent of the Governor’s stated goals. Neither the current Proposition 65 regulation nor the proposed changes harmonize with the initial intent of the proposition, which, according to the ballot initiative, was to prevent businesses from putting chemicals scientifically known to cause cancer or birth defects into the drinking water.
In summary, ACA opposes the proposed amendments to increase the Prop 65 warning content on the label and the requirement to submit, via a website, data that is already provided on the SDS.

If OEHHA is unwilling to fully withdraw all of the proposed amendments to Prop 65, ACA respectfully request that OEHHA consider the following recommendations:

1. Withdraw the website requirement, or allow industry to submit to the website voluntarily.
2. Retain the format of the existing warning language (“This product contains,”) rather than “Using this product will expose.” As noted above, using “will expose” is misleading and will open the door to even more unnecessary litigation.
3. Remove the chemical specific labeling requirements, maintaining the current labeling structure.
4. Remove the requirement to use the GHS health hazard symbol as part of the Prop 65 warning statement.
5. If a chemical listed under Prop 65 triggers the classification as a carcinogen or reproductive toxicant under the GHS, the product should be automatically exempted from providing a more detailed and repetitive Prop 65 warning, such as the one proposed by OEHHA.
6. Provide a sell through period for existing products, based on a product manufactured date, which protects industry from litigation during the process of changing labels. The sell through period should cover both the initial implementation period and any updates to section 25605 and should be established only after meaningful consultation has occurred between OEHHA and the regulated parties that will be impacted by these changes.

ACA remains hopeful that with continued collaboration between OEHHA and all interested stakeholders, Prop 65 reform will alleviate the large number of frivolous lawsuits crippling the system, while continuing to protect and inform the people of the state of California.

For additional information or questions, please contact Javaneh Nekoomaram at (202) 719-3715 or at jnekoomaram@paint.org or Stephen Wieroniey at (202) 719-3687 or at swieroniey@paint.org.

Respectfully Submitted,

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