June 13, 2014

Monet Vela  
Office of Environmental Health Hazard Assessment  
1001 I Street  
Sacramento, CA 95812  

Via email: P65Public.Comments@oehha.ca.gov  

**RE: P65 Warning Regulation**

Dear Ms. Vela:

The California Council for Environmental and Economic Balance (CCEEB) is a non-partisan, non-profit coalition of business, labor, and public leaders that advances strategies for a strong economy and a healthy environment. We appreciate this opportunity to comment on OEHHA’s preliminary proposal to amend the Proposition 65 warning regulations. We appreciate OEHHA’s stated goals of reducing frivolous litigation associated with Proposition 65 and improving the value of warnings that are issued. Unfortunately, OEHHA’s proposal does not meet this goal. Rather, we are concerned that the proposal, if adopted, would cause a significant increase in frivolous litigation without improving the quality of public and workplace warnings.

Unlike other environmental statutes that are enforced by administrative agencies, Proposition 65 can only be enforced by the Attorney General, District Attorneys and citizen bounty-hunter lawsuits. These lawsuits are not based upon any established scientific basis of when to warn, or any other clear objective standard. Instead, in each individual lawsuit, allegations of failure to make a required warning are made based on the plaintiff’s assumptions of what harm might result from any potential exposure to any chemical in any potential amount by any potential pathway. These suits are either settled out of court, or resolved by individual court rulings. In addition, there is no definitive body of technical research from which to determine whether a warning is required. Unfortunately, the proposed regulation does nothing to address these shortcomings.

There are numerous flaws in the proposed regulation. For example, the website proposal will not assist consumers as intended, but rather will become a detailed roadmap for new litigation by enterprising plaintiffs’ attorneys. The proposal would also eliminate the “safe
“harbor” warning language in the existing regulations, and will require companies to state that their products or operations “will expose” consumers to listed chemicals. In many situations, companies simply cannot be certain when and if an exposure will occur. For this reason, companies will choose to over-warn and unnecessarily scare individuals. Required use of the inflammatory pictogram will further dilute the warning and could cause confusion in situations where pictograms are presently used, such as warnings for exposure to hazardous medical waste.

Requirements for translations of warnings into multiple unspecified languages and the publication of brochures will also present new opportunities for legal challenge, under the guise of citizen enforcement.

OEHHA and the State of California should also consider the negative impression that visitors and tourists will receive at hotels, motels, restaurants, amusement centers and theme parks. Who would want to travel to a location where they will see signs and pictographs and other warnings that they are being exposed to potentially toxic materials? What business would want to locate in a state where workplace warnings encourage lawsuits in addition to consumer product based suits and environmental based exposure suits?

In summary, if the Proposition 65 program were based on sound science, subject to administrative regulation instead of citizen bounty-hunter lawsuits, and provided clear guidance as to when warnings were required, then the pre-regulatory proposal might have more merit. Since that is not the case, CCEEB recommends that you not proceed with this proposal.

Thank you. If you would like to discuss these comments, please contact Robert Lucas at 916-444-7337.

Sincerely,

Robert W. Lucas
Water, Waste & Chemistry Project Manager

Gerald D. Secundy
President

cc: The Honorable Jerry Brown, Governor, State of California
    Nancy McFadden, Executive Secretary to Governor Brown
    Cliff Rechtschaffen, Senior Advisor to Governor Brown
    George Alexeeff, Director, OEHHA
    Matthew Rodriquez, Secretary, California Environmental Protection Agency
    Kish Rajan, Director, Governor’s Office of Business and Economic Development
    Jackson Gualco, The Gualco Group, Inc.