Dear Monet Vela:

The Center for Environmental Health welcomes this opportunity to provide comments about the Office of Environmental Health Hazard Assessment’s proposed regulations to implement the warning provisions of the Safe Drinking Water and Toxic Enforcement Act. The proposed regulations are amendments to Title 27, California Code of Regulations, section 25601.

INTRODUCTION

We strongly support the proposed regulations. A primary intent of Proposition 65 is to provide Californians with information about exposure to toxic chemicals that will result from the activities of California businesses, either from the sale of products containing such chemicals or from activities that release such chemicals into air or other components of the California environment. The proposed regulations will make this information clearer, easier for Californians to understand, and protect Californian’s health better than the current regulations.

We offer specific comments below about the concepts in the proposed regulations that we believe would most successfully make Proposition 65 warnings more clear and reasonable. These concepts are as follows:

1) the “will expose” warning language suggested in the proposed regulations;
2) the warning transmission methods suggested in the proposed regulations;
3) the use of languages other than English suggested in the proposed regulations;
4) the identification of specific chemicals suggested in the proposed regulations; and
5) ways to provide information that supplements warnings suggested by the proposed regulations.

Finally, we suggest places where the proposed regulations could be improved.

1) limiting the scope of proposed §25603 (Court Approved Settlements)
2) clarification of proposed §25604 (Lead Agency Website)
3) elimination of proposed §25607 (Opportunity to Cure).

WAYS IN WHICH THE PROPOSED REGULATIONS WILL IMPROVE PROPOSITION 65 WARNINGS

“Will expose” warning language

Currently most Proposition 65 warnings use phrases that, at most, warn about the presence of a listed chemical without tying the warning to an exposure to that chemical (e.g., “this product contains”). OEHHA’s proposed language using the phrase “will expose” is clearer for consumers and residents of
areas where exposures occur. It provides the recipients of the warning with unambiguous information that is tied to Proposition 65’s prohibition on unwarned exposures. It also means that there will likely be a reduction in the number of unnecessary warnings, which will further the purpose of Proposition 65.

Warning transmission methods

A reasonable warning transmission method is one that is available to Californians being exposed to listed chemicals without those individuals needing to take any additional action to receive the warning. The proposed regulations about on-product or near-product warnings for food products and other consumer products and regarding environmental exposures (requiring warnings signs and/or personal delivery of warnings via mail or electronic methods) accomplish this goal. We also support the proposed language that requires such warnings prior to purchase of consumer products since a consumer receiving a post-purchase warning would then need to discard or return the product in order to avoid the exposure.

Use of languages other than English

OEHHA’s current proposal with respect to consumer products suggests that Proposition 65 warnings be provided in the same languages as on or off product labeling and other information. It also suggests that warnings about environmental exposures should be provided in the languages “commonly spoken the affected area.” Both of these proposals further the purposes of Proposition 65 by providing important information in a way that is accessible to all Californians. Our state has enormous diversity of languages and we are pleased that OEHHA is proposing to ensure that the law reflects this diversity.

Identification of specific chemicals

This proposal suggests that warnings applicable to at least one of a group of 12 chemicals (Acrylamide, Arsenic, Benzene, Cadmium, Chlorinated Tris, 1,4-Dioxane, Formaldehyde, Lead, Mercury, Phthalates, Tobacco smoke, Toluene) specifically identify the chemical(s) of concern. Significant exposures to these chemicals have commonly been found in consumer products, food, air and other environmental components. By naming the specific chemical(s), the Proposition 65 warnings would provide Californians with more tools to protect themselves from unwarned exposures. For instance, a consumer viewing such a warning could research more about the particular risks associated with that specific chemical, and avoid exposures to the same chemical from multiple products or environments. We suggest adding diesel exhaust to this list.

Information that supplements warnings

The proposed regulations provide that information to supplement warnings can be provided through pamphlets or other means. The proposed regulations also make clear that this information does not replace or substitute for a warning, and cannot dilute or negate the warning. This approach furthers the purpose of the statute by providing useful information to Californians while also ensuring that Californians still get clear and reasonable warnings as required by Proposition 65.

PROBLEMS WITH THE PROPOSED REGULATIONS

Scope of proposed §25603 (Court Approved Settlements)

CEH is sympathetic with the need to provide certainty and consistency for California businesses. However, it is also crucial to public health that improved regulations be implemented wherever they are appropriate. The proposed language allows businesses to avoid complying with the new regulations if they have at any point in the past been a party to a court approved settlement that prescribes warning language. The proposed language provides this exemption regardless of whether or not the new warnings address an exposure, product, or activity covered by the court approved settlement. In addition, businesses that had addressed previous exposures by eliminating the exposure would not be
covered by this exemption, thus undermining the level playing field that is a foundation of good regulation.

Clarification of proposed §25604 (Lead Agency Website)

The lead agency website described in this section would contain information that is useful to consumers, benefits public health, and furthers the purposes of Proposition 65. However, the proposed regulation should clarify that the information on the website is not a Proposition 65 warning, and does not take the place of a Proposition 65 warning. At the public hearing about this proposal, numerous commenters (from the regulated community) expressed concern that the web site could lead to increased litigation. To address these concerns, The proposed regulation should also clarify that the website information submission requirements are not subject to the enforcement procedures used for warnings.

To accomplish this clarification, we suggest the following additions to §25604:

(e) Nothing in this section shall be construed to limit, alter or otherwise affect the obligation to provide a clear and reasonable warning under Health and Safety Code section 25249.6. Compliance with this section does not constitute compliance with Health and Safety Code section 25249.6, nor shall failure to comply with this section constitute a violation of Health and Safety Code section 25249.6.
(f) Failure to comply with this section is not subject to enforcement under Health and Safety Code section 25249.7.

Elimination of proposed §25607 (Opportunity to Cure)

We support efforts to help small businesses comply with Proposition 65 and protect public health efficiently. However, this proposed regulation has the potential instead to undermine the statute since laws and regulations without consistent enforcement provisions are unlikely to be consistently obeyed. This also seems like a cure in search of a solution (since CEH is unaware of Proposition 65 cases being pursued against companies based on a warning sign that fell down), and that it will not even solve the problem it purports to cure (since a person intent on abusing Proposition 65 could still pursue a case and argue that the defendant does not qualify for this right to cure).

The issues facing certain small businesses in their efforts to comply with Proposition 65 were debated in the Legislature in 2013. The Center for Environmental Health worked closely with a number of legislators to pass AB227 which when signed into law provided a carefully targeted solution to these issues. AB227 has been successful and further actions of this type are not necessary.

Thank you for this opportunity to provide comments. And thank you for these efforts to make California a healthier state.

Sincerely,

Caroline Cox

Caroline Cox
Research Director
Center for Environmental Health