June 13, 2014

Monet Vela
Office of Environmental Health Hazard Assessment
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1001 I Street
Sacramento, California 95812-4010

Sent Electronically to: P65Public.comments@oehha.ca.gov

SUBJECT: PROPOSITION 65 REGULATION

Dear Ms. Vela:

Environmental Research Center (hereinafter, “ERC”) appreciates the opportunity to submit comments on the Office of Environmental Health Hazard Assessment’s (“OEHHA”) pre-regulatory draft proposal to amend warning sign regulations pertaining to the Safe Drinking Water and Toxic Enforcement Act of 1986, commonly referred to as Proposition 65.

ERC’s mission is to “safeguard the public from health hazards that impact families, workers, and the environment” by reducing “the use and misuse of hazardous and toxic substances, facilitating a safe environment for consumers and employees and encouraging corporate responsibility.” In furtherance of these stated goals ERC has actively pursued Proposition 65 claims as a private enforcer since 2009.

As a general comment ERC applauds the initiative OEHHA is taking to strengthen the purpose and reach of Proposition 65 by creating more clarity and specificity to its requirements. Proposition 65 was first passed by California voters in 1986 as a “right to know” law. It is time for the current law to be updated to address the needs of the public. ERC strongly supports OEHHA’s proposed amendments to Proposition 65 and views the current proposed amendments as a significant opportunity to further protect California consumers from dangerous chemicals known to cause cancer and reproductive toxicity.

The world has changed a great deal since 1986, but the purpose and spirit of Proposition 65 has not. Today, as then, California citizens want to be informed about potential and certain chemical exposures. The proposed amendments will greatly support those goals.
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Lead Agency Website

ERC fully supports OEHHA’s proposal to create a website compiling key pieces of information regarding each Proposition 65 violation and making that website available for public review. Currently, there is no easily accessible method available to the public for the review of Proposition 65 exposures. The public is greatly harmed by the lack of a centralized and accessible repository for information regarding the chemicals at issue, the exposure pathways for those chemicals, the risks resulting from exposure, and the ways exposures may be avoided. This must change.

Proposition 65 is a “right to know” law. The importance of easily accessible information regarding exposure to chemicals regulated under the law is irrefutable. Under the regulations as currently drafted, the information made available to the public by companies responsible for providing warnings is at best limited and inconsistent, and in some cases misleading. ERC can think of no better way to inform the California public about exposures to carcinogens and reproductive toxins than with a website with mandatory reporting requirements. Consumers can easily access this information via the website and then make an informed decision regarding a potential exposure.

This proposal is also directly in line with one of Governor Brown’s explicit goals in reforming Proposition 65: improving how the public is warned about chemical exposures. A centralized and accessible website run by OEHHA will help achieve Governor Brown’s goal by providing consistent and understandable information concerning exposures to the chemicals in ways that the public can understand.

During the workshop held on April 14, 2014, some participants expressed the view that creating a website containing supplemental warning information would result in an increase in frivolous litigation based on any arguable inaccuracies or inadequacies in the information submitted. This concern is overstated. The proposed section 25604, subdivision (e) provides that “[u]pdates to the information submitted under subsection (a) must be provided within 30 days after the person providing a warning becomes aware that an exposure to an additional chemical or chemicals for the same product, occupational or environmental exposure requires a warning, or if any other updates to information required by subsections 1 to 11 are needed.” This language provides a grace period to make corrections or additions to previously submitted information based on facts or circumstances that come to light after the initial submission. This means that any party that conducts a due diligence investigation and submits the required information to OEHHA would not be liable for inaccuracies or inadequacies in that information so long as they were promptly corrected when brought to the party’s attention. This is entirely consistent with the existing framework of Proposition 65, which requires plaintiffs to demonstrate that any failure to provide a clear and reasonable warning is both knowing and intentional. Far from being frivolous,
litigation brought based on knowing and intentional failure to comply with the reporting requirements of section 25604 would be a logical extension of the existing requirement that warnings be clear and reasonable, and would be consistent with Governor Brown’s intention to “require more useful information to the public on what they are being exposed to and how they can protect themselves.”

**Disclosure of Certain Chemicals**

ERC further urges OEHHA to adopt a proposed amendment requiring businesses to disclose the presence of 12 commonly detected chemicals on the Proposition 65 warning. Including the specific chemical name on the warning will confer a considerable benefit on the public because the public will know exactly which of these 12 common chemicals, if any, are contained in the product. Armed with this information the consumer can then access the Lead Agency website for more information on the specific chemical and potential harm from the exposure. In the event that the Proposition 65 warning pertains to a chemical not included among the list of 12, the consumer can still access the Lead Agency website for more information.

Any potential hardship that this may cause businesses is inconsequential when compared with the public benefit it will confer. Businesses are already required to provide a warning on contaminated products, and the addition of a few more words is easily accomplished and is not cost-prohibitive. On the other hand, consumers have a right to know about the presence of those chemicals under Proposition 65 and this requirement will streamline the information provided to the individual.

Contrary to the objections of some business groups, the addition of one, two, or even three simple chemical names in the text of a warning will not be confusing or overly cumbersome. To the contrary, including this additional information will make warnings more meaningful and real to the general public.

**Food Exposure Warnings – Content**

ERC urges that Section 25607.4 be amended to require a statement that the exposure will occur through consumption of the food product. ERC agrees with OEHHA that using the statement “consuming this product will expose you to...” will focus the individual on the exposure itself rather than the possibility that the product “contains” a chemical. (Draft Initial Statement of Reasons, pg. 23, March 7, 2014.) The revised warning emphasizes to the individual that the product to be consumed is contaminated and that its consumption should not be taken lightly. This detailed disclaimer clearly informs the individual that a product contains one or more chemicals that are unsafe, and that consumption will cause exposure to these unsafe substances. Conveying the certainty of exposure, rather than a general statement about the presence of a
chemical, is critical in properly informing the public so that individuals can make meaningful choices about the products they choose to purchase and the companies they support.

Conclusion

ERC looks forward to continuing to participate in constructive dialogue with OEHHA and other business groups to develop effective amendments to Proposition 65. Thank you for the opportunity to submit comments on the proposed amendments, and for considering our letter.

Sincerely,

[Signature]

Chris Heptinstall
Executive Director, Environmental Research Center