5 June 2014

Monet Vela
Office of Environmental Health Hazard Assessment
P.O. Box 4010
1001 I Street
Sacramento, California 95812-4010
P65Public.Comments@oehha.ca.gov

Re: Comments on Potential Amendments to Proposition 65 Clear and Reasonable Warnings Requirements

Dear Ms. Vela:

Thank you for the opportunity to comment on the Office of Environmental Health Hazard Assessment’s potential amendments to Proposition 65 (Prop 65) Clear and Reasonable Warnings Requirements. The Phylmar Regulatory Roundtable – Occupational Safety and Health Forum (PRR) is a group of 34 members from the public and private sectors, companies and utilities, all committed to improving workplace safety and health. Toward that end, PRR provides informal benchmarking and networking opportunities. In addition, participating companies work together in the rulemaking process to develop recommendations for federal and state occupational safety and health agencies. Combined, PRR members employ more than 400,000 individuals in the U.S., with annual revenues of more than $750 billion; 15 members rank among the Fortune 500 companies.

Many of our members have extensive experience in handling Proposition 65 compliance in occupational, environmental, and consumer settings, and have voiced some general concerns about the draft proposal. We also have specific comments on different aspects of the proposed revisions. OEHHA has stated its intention to publish a formal draft by the end of the summer which leads us to believe it is preparing to go ahead with the draft largely as written. Although we appreciate the Agency’s goal to improve the public’s ability to access information concerning exposures to Proposition 65 substances, PRR believes that the draft proposal will not improve the effectiveness of Proposition 65, and requests the Agency reconsider proposing these amendments. If OEHHA decides to move ahead with this proposal, we hope the Agency will consider incorporating some of the practical recommendations suggested by commenters.

These comments are separated into general and specific sections. The general comments address broader issues about the proposed draft regulation, while the specific comments identify areas of concern and support for particular aspects of the proposal. Although companies participating in PRR contributed guidance and recommendations, the opinions expressed below are those of Phylmar, and may differ from beliefs and comments of individual PRR companies. We offer the following comments and suggestions to help inform OEHHA’s deliberations.

GENERAL COMMENTS

1. **OEHHA has Not Demonstrated the Necessity of the Potential Amendments**

   In describing the standards of judicial review of proposed regulations, and the role of Office of Administrative Law (OAL), Section 11349.1(a) of the California Government Code provides:

   “The office shall review all regulations adopted, amended, or repealed pursuant to the procedure specified in Article 5 … and submitted to it for publication in the California Code of Regulations Supplement … and make determinations using all of the following standards:
   (1) Necessity.
   (2) Authority.
   (3) Clarity.
   (4) Consistency.
   (5) Reference.
   (6) Nonduplication.”
Section 11349(a) of the Government Code defines the term “necessity” as:

“(a) “Necessity” means the record of the rulemaking proceeding demonstrates by substantial evidence the need for a regulation to effectuate the purpose of the statute, court decision, or other provision of law that the regulation implements, interprets, or makes specific, taking into account the totality of the record. For purposes of this standard, evidence includes, but is not limited to, facts, studies, and expert opinion.”

Although OEHHA has not released a formal proposal, PRR believes that the Agency’s discussions involving the draft proposal and the Initial Statement of Reasons do not support the necessity to go forward with amendments to the occupational warning requirements. The broad requirements of the State’s recently-revised Hazard Communication Standard (HazCom – 8 CCR 5194), and the incorporation of Federal OSHA’s Globally Harmonized System (GHS), as well as the current Proposition 65 occupational warning requirements, provide for a comprehensive health and safety regulatory scheme for employers to sufficiently warn and train employees on potential exposures to hazardous substances in their workplace. Under HazCom, employers must already provide training, workplace warnings, a hazard communication program, and detailed information from the safety data sheets on hazardous substances to employees.

PRR does not believe there is a reasonable need to have employers submit information to OEHHA for the Proposition 65 Warnings website as proposed. We recommend that OEHHA not include occupational exposures on its proposed website.

Given the broad scope and compliance implications of the potential amendments, PRR members believe it would be prudent for OEHHA to provide more evidence demonstrating that the current Proposition 65 warning signs are inadequate and that the draft proposal would likely correct those deficiencies. We also question whether these modifications would create additional health and safety benefits for employees that are a worthwhile use of limited safety and health resources that will be devoted to changing warning signs and labels. This is especially the case considering manufacturers and employers have been and will continue to implement related measures with the recently revised HazCom Standard (8 CCR 5194) and are required to provide effective training under that standard as well as the Injury and Illness Prevention Program (8 CCR 3203).

PRR recommends that the Agency more clearly justify undertaking these broad reforms. In particular, PRR believes the proposed changes to the occupational warnings do not provide any significant additional benefit to employees beyond current federal and state regulations. Many PRR members share the view that changing the warning language and adding a website will not likely alter their customers’ or employees’ behavior, but instead may cause more confusion and frustration.

2. **Proposed Occupational Warnings are Duplicative of Globally Harmonized System’s Hazard Communication Standard**

Section 11349(f) of the Government Code defines the term “nonduplication” as:

“(f) “Nonduplication” means that a regulation does not serve the same purpose as a state or federal statute or another regulation. This standard requires that an agency proposing to amend or adopt a regulation must identify any state or federal statute or regulation which is overlapped or duplicated by the proposed regulation and justify any overlap or duplication. This standard is not intended to prohibit state agencies from printing relevant portions of enabling legislation in regulations when the duplication is necessary to satisfy the clarity standard in paragraph (3) of subdivision (a) of Section 11349.1. This standard is intended to prevent the indiscriminate incorporation of statutory language in a regulation.”

PRR believes strongly that the proposed changes are, from both a realistic and practical standpoint, duplicative of the HazCom Standard that is required for hazardous substances found in the workplace. PRR members are unable to envision any Proposition 65 chemical in use in the workplace where a company would not already have a Hazard Communication Program implemented in which the nature of the health hazards and measures to protect health are provided to workers, as well as training on Safety Data Sheets (SDSs) and the new label warning requirements. PRR supports efforts to harmonize Proposition 65’s occupational warnings with GHS warnings to reduce confusion. However, we believe this proposal does not
further any harmonization. Rather, it creates additional warning requirements and chemical information submission requirements that are duplicative and unnecessary in light of the recently revised and comprehensive HazCom Standard.

3. **OSHSB is the only Agency with the Authority to Adopt Occupational Safety and Health Standards in California**

In describing the powers of the Occupational Safety and Health Standards Board (OSHSB), Section 142.3(a)(1) of the California Labor Code states: “The board, by an affirmative vote of at least four members, may adopt, amend or repeal occupational safety and health standards and orders. *The board shall be the only agency in the state authorized to adopt occupational safety and health standards.*” (Emphasis added.) This conflicts with Proposition 65’s enabling provisions, found in Section 25249.12(a) of the California Health and Safety Code, which provides that the designated lead agency “may adopt and modify regulations, standards, and permits as necessary to conform with and implement this chapter and to further its purposes.”

We believe this creates a question of law regarding OEHHA’s authority to adopt new occupational warning requirements that are, in effect, occupational safety and health standards. When California voters passed Proposition 65 into law by ballot measure, they had the authority to override Labor Code Section 142.3(a)(1) and created the Prop 65 occupational warning requirements. Although Health and Safety Code Section 25249.12(a) gave OEHHA the authority to adopt and modify Prop 65 regulations, we question whether the Agency has the authority to adopt such sweeping changes to the occupational warning requirements in light of the clear command of Section 142.3(a) of the Labor Code, reserving the power to adopt occupational safety and health standards solely with the Occupational Safety and Health Standards Board.

We believe considering OEHHA’s proposed occupational warning requirements in light of the significant amount of resources that Cal/OSHA has spent incorporating the GHS into the HazCom Standard, demonstrates why the California Legislature intended OSHSB to be the only agency with the authority to adopt occupational safety standards.

4. **Concern that Proposed Amendments Will Not Decrease Litigation and May Create New Sources of Litigation**

A primary goal of Governor Brown’s administration in reforming Proposition 65 is to reduce the amount of litigation that has ensued since its passage in 1986. PRR does not believe this proposed draft will help accomplish this goal and may in fact have the opposite effect. Many industries represented at the April 2014 workshop argued that the litigation reform provisions of the proposal do not do enough to reduce frivolous Proposition 65 lawsuits. Commenters also pointed out several plausible scenarios where proposed language and issues of compliance may be a source for new types of Proposition 65 litigation, such as the requirement to provide the agency with all “reasonably available” information on a listed substance.

Since the proposal is based around provided warnings for actual exposures at or above threshold levels, the only way to prove, or disprove, such an “exposure” would be in a court of law. A company may perform an Industrial Hygiene survey that shows employees are exposed to a level below the threshold requiring warning, but could still be subject to a lawsuit claiming that the exposure is above the threshold and seeking to create a factual dispute in the courtroom. PRR believes the current prophylactic system of warning based on the presence of a chemical provides much more certainty and protection against litigation.

PRR also has concerns that the requirement to post all of the information on a public website will lead to mining opportunities for the plaintiff attorneys to file frivolous lawsuits. PRR recommends not including occupational exposure information in the website.

5. **Compliance Related Issues**

PRR believes this proposal contains far-reaching changes that in many instances will be difficult to comply with and costly depending on how OEHHA interprets the proposed language. For example, several PRR members currently post warnings routinely at building entrances, which is the current norm for industry to meet Prop 65 warning requirements. Under the draft proposal, if a company posts warnings, they will be required to provide “a routine list of information to OEHHA,” and “provide reasonably available anticipated level of human exposure.” The interpretation of what is “reasonably available” is critical. Does this mean a
company will have to conduct air monitoring? May a company conduct an exposure assessment based on vapor pressure (which would not apply to metals such as lead), etc.?

We believe there will be difficulties and compliance issues related to the determination of whether a threshold level exposure is taking place. For example, how should an employer treat substances for which there is no assigned maximum allowable daily limit or no significant risk level? PRR foresees that the proposed revisions will create compliance challenges and considerable financial burden unless more clarification and guidance is provided by OEHHA.

Under the proposed amendments, because of a fear of litigation, it seems likely in many instances that employers/building operators will feel compelled to still provide warnings as is customarily done now under the safe harbor approach. However, the new warnings will require telling people that they will be exposed to cancer-causing substances just by entering the area. In many instances this will be misleading, as the threshold exposure or any exposure may only occur infrequently under certain circumstances. While it is important to post signage to warn people about the hazards and exposures they could face, it is not helpful and even counterproductive to post signage that warns people about hazards that do not actually pose any significant risk, because they will come to generally undervalue that safety signage, even in cases when it is warning against a more significant risk.

If there is a specific area in a building that requires a warning under the proposed amendments, how should employers/operators treat the rest of the building or areas of the building nearby where people are located? If there is clearly no chance of a threshold exposure then no additional warnings would be required, but in many instances it seems the proposal may require employer/operator to make several determinations of exposure levels throughout the building. Even if air samples were taken in the surrounding areas and the building itself, they would represent only a snap shot for that moment in time, and would not be conclusive whether it is possible for a threshold exposure to occur in that area. In this type of situation it is much clearer under the current requirements to utilize the safe harbor approach and simply state that Proposition 65 chemicals are present in the building. The workers in the area with the known exposure are sufficiently protected by current health and safety standards on hazardous substances, and the current Prop 65 warning requirements provide sufficient notice of risks to exposure.

6. **Flood of Available Information Will Cause Confusion and Needless Worry**

PRR believes that the amount of information OEHHA will receive on chemicals for the proposed website, www.P65Warnings.ca.gov, could undermine the Agency’s goal of increasing the public understanding of exposures and risk. While having access to more information is a positive goal, unless the Agency is prepared to distill and assimilate all reasonable information that is submitted, viewers of the website may be simply inundated with information, much of it contained in very technical language. There is also concern about ensuring the accuracy of the information that is submitted by parties.

In the occupational setting, employees are trained in the specific health effects of the chemicals they work with, the nature of the exposures, workplace conditions, and measures to protect their health. We believe that needless worry will result from directing employees to the proposed website because it will not have information on their specific exposure scenario. Employees are trained to speak with supervisors if they have questions on how to properly deal with hazardous substances in their workplace. The amount and nature of the information proposed to be included on the website may create misunderstanding and unnecessary apprehension.

In the environmental setting, under the current regulation, visitors to a facility have an opportunity to read a warning of the presence of Proposition 65 substances prior to entering. If they have questions, there is a mechanism for the visitors to find out information. The proposed regulation will not provide any additional information or make it easier for visitors to obtain the information they may be seeking at the time they are viewing the warning.

7. **Compliance Would be Overly Burdensome for Employers and California Businesses**

PRR is concerned that the proposal would be overly burdensome on employers in terms of reevaluating existing warnings, making determinations for actionable exposure levels, changing all warning signs, and providing all the proposed information to OEHHA for the Prop 65 Warning website, particularly since
workplace exposures are addressed under HazCom and the Proposition 65 warnings would provide no additional worker protection. Further, the requirement imposed on manufacturers of chemical products to continually provide information to OEHHA to populate a website is both expensive and duplicative of federally mandated requirements. The removal of the Safe Harbor warning would create a significant additional burden on employers to determine if a threshold exposure is taking place. Several PRR members believe that the proposed occupational warnings would entail a significant expansion and reworking of compliance processes of Proposition 65 without achieving any real benefit to workers.

PRR also believes these proposed amendments would unfairly burden California manufacturers and businesses that would have to provide detailed information and new warnings that out of state manufacturers and businesses would not have to comply with, including out of state manufacturers selling products in California.

SPECIFIC COMMENTS

1. Changing the Words “May Contain” to the Words “Will Expose”

On one hand, PRR supports the proposed change in warning content from stating, “This product ‘contains’ a chemical known to the State of California to cause cancer or other birth defects or other reproductive harm” to “this product ‘will expose you’ to a chemical . . .” We believe this will make it clear that a Proposition 65 warning is not required in situations where there is no chance of exposure. For example, one PRR member had a payment office that posted warning signs because there was a Proposition 65 chemical in the liquid paper that an associate kept at their desk. The office eventually took the signs down after determining that neither employees nor customers were being exposed to the Proposition 65 chemical contained in that bottle of liquid paper.

On the other hand, PRR members have voiced concerns about potential negative consequences resulting from changing the word “contain” to the words “will expose.” One concern is that “will expose” will in many instances be too definitive of a statement, since consumers use products differently and in different frequencies, and is potentially misleading to the public. The proposed warning language of “will expose” conveys that exposure to the employee is a foregone conclusion no matter the circumstances.

Under the proposed occupational exposure warnings, the phrase “will expose” is used relative to entering the work area where Prop 65 chemicals are used or stored. It is not the case that an employee will be exposed if they simply enter the work area and the Prop 65 chemicals are properly contained and stored. Similarly, in a laboratory setting, if good laboratory practices are followed, such as compliance with established procedures and training, use of engineering controls and use of personal protective equipment (PPE), one should not assume that despite these measures they will be exposed. A company could be placed in the position of putting a warning up to meet a regulatory requirement that the company believes is untrue.

Because of the difficulty in determining if there is a threshold exposure coupled with the fear of litigation, PRR foresees many instances where employers will post a warning even though they believe no exposure is taking place. PRR suggests the Agency consider using alternative language from “will expose you” to “may expose you” or “may expose you if proper safety precautions to prevent exposure are not taken.”

2. Inclusion of the GHS Health Hazard Pictogram

PRR believes that the proposed requirement to include the GHS Health Hazard pictogram is not helpful or appropriate. The GHS pictogram is to be placed on product labels under the GHS scheme based on globally standardized hazard classification criteria, which differs significantly from the system used to list carcinogens and reproductive toxicants under Proposition 65. PRR also believes that requiring the image of the health hazard pictogram to the warnings will not be effective in furthering the public’s understanding of their risk. This symbol does not suggest the concept of “cancer” or “birth defects” to observers and most people in California have no idea what the symbol means (unless they have been trained by employers under HazCom). The printed text warnings currently required by Prop 65 already provide as clear and understandable a warning as possible as to the nature of risk present.
Concerning the proposed occupational warnings, in many instances the inclusion of the health hazard pictogram would be redundant as manufacturers and employers are implementing the GHS pictogram scheme under HazCom. PRR does not see how the inclusion of this pictogram will improve the warnings currently provided to employees.

PRR members also are concerned about the proposed requirement to include the GHS health hazard pictogram on containers of chemicals in the occupational setting. Under GHS, pictograms are only required on shipped containers and are not specifically required on secondary containers. By requiring pictograms on all containers, we believe OEHHA is unnecessarily expanding the scope of the GHS container labeling requirements. This could also create a potential compliance issue as new containers are brought into the manufacturing areas. PRR recommends that OEHHA not propose requiring pictograms on secondary containers.

3. **Labels**

Under the draft proposal, there is a substantial increase in the content required on warning labels for products or containers used by consumers and employees in the workplace. PRR believes this will further clutter labels and make them impractical for the public or employees to reasonably read and understand. In addition, chemicals used in workplaces must already comply with the recently revised labeling requirements of HazCom. PRR recommends that products already containing a GHS label should receive an exemption from the amended warning content.

PRR also has concerns under the occupational warnings for products, specifically how members will be able to comply with labeling requirements when employees work with small containers. It will be difficult and in some instances impossible to fit the entire text as proposed on the label of a small container such as a 500mL or 250mL capacity squirt bottle. PRR requests that for occupational warnings, OEHHA consider providing an exemption to additional small container labeling requirements or provide an alternative for a shorter warning label on small containers in the workplace, as is proposed for consumer product warnings § 25607.2(b). Another alternative would be to incorporate components of the HazCom Standard, which at Section 5194(f)(6)-(8), provides flexibility for the requirements of labeling small, secondary, or portable containers for immediate use.

In the absence of incorporating revisions to address these issues, it would be helpful if the Agency could provide more guidance for employers on how to handle placing labels on small containers, such as a 10mL capacity bottle.

4. **Clarification on Information Provided to Lead Agency Website**

PRR seeks clarification regarding the 11 items of information that must be provided to the lead agency under proposed Section 25604. Would this require site-specific information or general information on the substance and exposure?

Does the information reported to the agency have to consider all the exposure routes, levels of exposure, and methods for minimizing exposure for every potential site-specific scenario? There may be multiple types of exposure depending on whether you are a maintenance worker working on an exhaust system, a process worker working with a tool containing this chemical, or a waste collector. As stated above, information on the chemicals used by workers and measures to protect their health is provided directly to workers as part of HazCom training. Again, we recommend that occupational exposures not be included on the website.

5. **Use of OEHHA-Tailored Warnings Should be Absolute Defense to Warning Sufficiency Claims**

PRR supports OEHHA adopting tailored language for specific locations, such as a parking structure or a smoking-allowed area, provided, however, the regulation also states clearly that utilizing signs with OEHHA-tailored language is an absolute defense to any lawsuit claiming that the party did not provide sufficient warning.
6. **Warnings in Languages Other than English**

While some PRR members have voiced support for having one sign in English and a second sign next to it in Spanish, they do not support adding additional language requirements. Writing Proposition 65 signs in additional languages for every location would be overly burdensome, particularly since not all languages are present in all workplaces.

Again, thank you for the opportunity to provide these comments on the Proposed Amendments. PRR would be pleased to discuss any of these comments further with OEHHA staff.

Sincerely,

Elizabeth A. Treanor
Director
Phylmar Regulatory Roundtable

PRR Sacramento Office: P. O. Box 660912, Sacramento, California 95866
+1.916.486.4415