June 13, 2014

Via E-Mail (to P65Public.Comments@oehha.ca.gov)

Ms. Monet Vela
Office of Environmental Health Hazard Assessment
P.O. Box 4010
Sacramento, California 95812-4010

Re: Western States Petroleum Association’s Comments on Pre-Regulatory Proposal for Amendments to Proposition 65 Warning Regulations

Dear Ms. Vela:

The Western States Petroleum Association (“WSPA”) appreciates this opportunity to provide comments on the Office of Environmental Health Hazard Assessment’s (“OEHHA”) March 7, 2014 “pre-regulatory” draft regulatory amendments to the Proposition 65 (“Prop 65”) regulations governing “clear and reasonable warnings.” We recognize that OEHHA has not yet initiated a regulatory proceeding pursuant to the Administrative Procedure Act (Cal. Gov. Code §§ 11340 et seq.), but is seeking stakeholder and public input before formally proposing changes to the Prop 65 regulations. If OEHHA decides to initiate a formal regulatory process for proposed amendments to the Prop 65 regulations, WSPA reserves the right to supplement these comments at that time.

In August 2013, WSPA provided comments to OEHHA and Cal-EPA in the context of the proposed legislative reforms to Prop 65. Many of the issues raised in those comments apply with equal force here, and we are attaching those comments to be incorporated herein by reference.

As we stated during last year’s process, WSPA remains committed to working with OEHHA and the Governor’s office to adopt changes to the Prop 65 statutes and regulations designed to streamline the warning process and ensure that warnings are “clear and reasonable” without being unduly burdensome, inaccurate or misleading, or inherently unworkable in practice. We wholeheartedly agree with the Governor’s May 2013 call for Prop 65 reforms designed to “end[] frivolous ‘shake-down’ lawsuits” and “improv[e] how the public is warned.” Governor Edmund G. Brown, Jr. Press Release, “Governor Brown Proposed to Reform Proposition 65,” May 7, 2013 (“Governor’s Press Release”).
However, the currently proposed regulations would only increase uncertainty for businesses and the public, result in more confusing and cumbersome warnings, fail to provide the public with useful information about the chemicals at issue, and ultimately fuel a new round of lucrative litigation for plaintiffs’ attorneys. Worse, the proposed regulations could promote unwarranted and widespread fear, as the public could misconstrue new warnings that individuals “will be exposed” to a listed chemical to mean that there has been some actual increase in chemical exposure risks. The proposed Prop 65 warning regulations fails to meet many of the reform criteria set out by the Governor, and WSPA cannot support the proposed regulations without significant revisions to address the issues discussed below.

I. The Proposed Removal of Safe Harbors From the Prop 65 Regulations Would Introduce Significant Uncertainty for Regulated Parties and Would Result in More Prop 65 Litigation

One of the most problematic changes the proposed regulations would make is to sweep away the long-established “safe harbor” warning language on which regulated businesses have relied for many years to satisfy the Prop 65 “clear and reasonable” warning requirement. Instead, the proposed regulations would require each warning to, “at a minimum, comply with all the applicable requirements of [amended Article 6].” Proposed 27 C.C.R. § 25601(a) (emphasis added). The proposed regulations now would provide no guidance on what types of warnings or language would be sufficient to be deemed “clear and reasonable,” and no bright-line “safe harbor” protection against litigation over the adequacy of a warning. Thus, contrary to OEHHA’s claim that “businesses would be able to rely on their compliance with the regulations” to avoid liability (Pre-Regulatory Draft Initial Statement of Reasons (“ISOR”), March 7, 2014, p. 2), the proposed language, in fact, would not give businesses any certainty whatsoever that even full compliance with all of the proposed regulations would result in a “clear and reasonable warning,” or insulate them from lawsuits from bounty hunter plaintiffs.

This is directly contrary to the Governor’s statement just last year that Prop 65 reforms were needed to “end[] frivolous ‘shake-down’ lawsuits” under Prop 65 designed “to extract settlements from businesses with little or no benefit to the public or the environment.” Governor’s Press Release. Far from reducing frivolous litigation, removing the safe harbor regulation in favor of setting “minimum” requirements for warnings all but invites opportunistic Prop 65 plaintiffs’ counsel to challenge virtually any warning as being less than “clear and reasonable,” notwithstanding its compliance with the proposed regulations. And as discussed in more detail below, adoption of the proposed regulations would provide plaintiffs’ counsel a treasure trove of new technical arguments to raise in their Prop 65 complaints.

This dramatic and unwarranted departure from the state’s decades-long Prop 65 interpretations also contradicts the reasoned conclusions OEHHA’s predecessor agency made when the Prop 65 warning regulations were first promulgated. In originally adopting the safe harbor provisions, the California Health and Welfare Agency (“Agency”) observed that:

Since the Act imposes civil liability where is found not to be clear and reasonable, the Agency has concluded that it is necessary to provide businesses with an opportunity to be certain that the warning which they give is reasonable or clear, or both, and that providing general ‘safe
harbor’ warning methods and messages which are deemed sufficient without further proof is a reasonable means to accomplish this result.

Cal. Health & Welfare Agency, Revised Final Statement of Reasons (Nov. 1988), pp. 7-8 (emphasis added). The Agency further observed that “[t]he ‘safe harbor’ provisions create generic warnings which are clear and reasonable. Since all warnings cannot be clear and reasonable, it is essential for the regulation to describe with some specificity the warning methods and messages.” Id., p. 26 (emphasis added). These statements are recognition that, since the birth of the Prop 65 regulations, it has been critical for businesses to have certainty about what warnings would meet the statutory requirements and thus avoid civil liability. That certainty is no less critical today.

Removal of the safe harbor language would result in a patchwork of different Prop 65 warnings that attempt to meet all of the new requirements contained in the proposed regulations. As discussed below, many of the newly proposed warning requirements do not provide the public any information on whether the individual will actually be exposed to the chemical, how the individual might avoid exposure, and whether any exposure would result in any actual measurable health risk to the individual. In any event, some of these warnings might be deemed clear and reasonable, and others might not. What is clear is that all of these warnings will be susceptible to further “shake-down lawsuits” from bounty-hunting plaintiffs’ attorneys, and businesses would have no way of knowing whether any particular warning was in fact “clear and reasonable.”

Accordingly, WSPA cannot support OEHHA’s proposal to completely abandon the decades-old safe harbor provisions. To do so would be a clear invitation for increased litigation, with no certainty for business and no clarity for the public.

II. State-Approved Prop 65 Warnings Have Already Been Deemed “Clear and Reasonable” and Should Not Be Subject to Article 6

As we communicated to Cal-EPA and OEHHA in last year’s efforts to implement legislative reforms to Prop 65, any change to the Prop 65 warning requirements must further the dual goals of providing “clear and reasonable warnings” to individuals prior to knowing and intentional exposure to listed chemicals, and providing regulated businesses with certainty that a given warning will meet the requirements of Prop 65. While the pre-regulatory draft properly exempts from regulation warnings already approved as “clear and reasonable” in existing court-approved settlements, it arbitrarily fails to extend that exemption to Prop 65 warnings already approved out of court by the state Attorney General (“AG”) or OEHHA. See Proposed 27 C.C.R. § 25603.

Warnings that have undergone review and approval by the state enjoy a special status under Prop 65. They both provide certainty for businesses and represent the state’s determination, after careful analysis of the applicable statutes and regulations, that the warning in question is “clear and reasonable” as applied to the products or areas in question. Such state-approved warnings may be embodied in a court-approved settlement, a written determination by the state Attorney General or OEHHA, or other similar writings. The critical characteristic shared by these approved warnings is that they are final decisions of the state or the court, and resolve the question of whether a particular warning is “clear and reasonable” from a state enforcement perspective. For many years, stakeholders
have reasonably relied on such warnings as meeting the Prop 65 requirements with respect to the products in question.

The draft Initial Statement of Reasons (“ISOR”) on the proposed amendments provides little explanation of why the protection for state-approved “clear and reasonable” warnings was not extended beyond court-approved settlements, other than to assert that recognizing warnings in such settlements “will provide certainty for those parties in litigation that have agreed on a given method or content for warnings, and provide deference to the courts that have approved those settlements.” ISOR at 8-9. But the interests of certainty and deference are best promoted by ensuring that other state-approved warnings receive equal status to warnings in “court-approved settlements.” Like warnings in court-approved settlements, state-approved warnings also reflect an agreed-upon “given method or content for warnings,” and the state’s determination out of court deserves no less deference than a court-approved settlement.\(^1\) It makes little sense that OEHHA would adopt a regulation effectively rewarding parties who chose to litigate before arriving at a warning (perhaps with little state input), while effectively punishing parties who avoided litigation by proactively seeking state approval that a given warning was “clear and reasonable” in the first place.

OEHHA complains that it is not willing to broadly “adopt all warnings that are currently being provided pursuant to informal opinions provided by the Attorney General’s Office or OEHHA, and all current warnings in compliance with existing regulations.” \(\text{Id.}\) at 9 (emphasis added). This last clause appears to be the crux of OEHHA’s concern. OEHHA argues that “incorporating such a provision into this proposal would essentially result in little change in the content and methods of delivery for the warning for many, many years, since the proposed regulations would only affect situations in which a warning is not currently being provided.” \(\text{Id.}\)

Here, OEHHA presumes a much broader scope of exemption than is necessary to vindicate the goals of “clear and reasonable” warnings and certainty for stakeholders. OEHHA can exempt warnings previously approved by the AG’s Office or OEHHA itself without also exempting “all current warnings in compliance with existing regulations.” The former category of warnings has the approval of the state after careful analysis; the latter category may not.

Moreover, the purpose of the regulations should not be to force arbitrary changes in the “content and methods of delivery for warnings” simply for the sake of change. Warnings that have received close scrutiny and approval from the state for a given product ideally should not require substantial changes over time to remain “clear and reasonable” if the product itself and its potential path of exposure do not change. A state-approved warning may have been used by companies for many years to provide effective “clear and reasonable” warnings to millions of Californians without dispute. To force these effective warnings to be rewritten for no good reason would impose an expensive and illogical requirement on California businesses with no documentable benefit.

Prohibiting reliance on state-approved warnings also would frustrate the state’s goal of providing certainty to businesses without forcing needless litigation. By exalting court-approved settlements over other final out-of-court state determinations, OEHHA would send a public message that such

\(^1\) Indeed, an approving court may apply only cursory review to the substance of a warning, largely deferring to the parties’ agreement on what is “clear and reasonable” rather than applying a more rigorous product- or area-specific review of the type often applied by the AG’s Office or OEHHA.
agency determinations are of no value, and that businesses can only obtain certainty on whether a warning is “clear and reasonable” through litigation. The current proposal would sweep away all protection for out-of-court state-approved warnings regardless of whether the product has changed at all, allowing private plaintiffs to bring new litigation over previously-settled warning language. This would only increase meritless litigation, and would offer no additional benefit to the public.

III. Requiring Businesses to Warn That a Product “Will Expose You” to a Listed Chemical Will Create Much Greater Uncertainty and Potential Liability for Businesses, and Will Promote Further Inaccurate “Overwarning”

The most troubling change the pre-regulatory draft proposes to the content of the warning is to do away with the current safe harbor statement that the product or area at issue “contains a chemical known to the state of California to cause cancer or reproductive harm.” Instead, OEHHA proposes now requiring businesses to state that the public “will be exposed” to Prop 65-listed chemicals. Because proving or disproving “exposure” (i.e., any “contact” with a listed chemical) in every possible situation is difficult or impossible, the language would force many businesses into a “Catch-22”: post a warning advising all members of the public that they “will be exposed” even though it may not be true (and risk plaintiffs filing lawsuits based on the “concession” of exposure), or do not post a warning if the business has insufficient evidence that the public definitely “will be exposed” (and risk lawsuits alleging failure to warn if a product or area contains the listed chemical). While OEHHA has claimed this change only goes to the content of a warning, the risk involved in determining “exposure” in every possible case will force many businesses to warn out of caution, effectively making this a change that goes to the question of whether a business should warn. We strongly urge OEHHA not to adopt language that puts businesses in such an impossible position, promotes potential misinformation and resulting fear-mongering to the public, and increases the likelihood of frivolous litigation.

Businesses face inherent uncertainty concerning whether every person in every situation “will be exposed” to a Prop 65-listed chemical in a product or an area. Indeed, in many cases it is impossible for a business to know whether a given individual in the abstract “will be exposed” to a Prop 65-listed chemical in a product or area; more information is needed about the nature and duration of the individual’s particular interaction with the product or area. This uncertainty is one of the reasons OEHHA defined an “environmental exposure” as “an exposure requiring a warning, that may foreseeably occur as the result of contact with an environmental medium.” 27 C.C.R. § 25602(c) (emphasis added).

In contrast with that inherent uncertainty, the mandatory “will be exposed” language of the proposed regulation allows for no case-by-case distinctions, and is wholly at odds with the “may foreseeably occur” language in Section 25602(c). Scientific uncertainty about exposure pathways, the dispersion and concentration of the chemical in the affected area, the individual’s residence time in the area and other factors may mean that a business can only conclude, at most, that an exposure “may foreseeably occur.” This requires that a clear and reasonable warning be posted. But the proposed regulations would mandate the warning to state that exposure “will” occur – even if the evidence does not clearly support that more aggressive conclusion. This would actually render the warning language unclear at best, and false at worst.
The proposed “will be exposed” language cannot regulate away this uncertainty. Instead, the proposed language would force businesses to decide whether *every* member of the public viewing the warning will be exposed to the chemical in the product or area, or whether *every* member of the public viewing the warning will not be so exposed. Most businesses will not be able to prove zero possibility of exposure from a product or area that contains the listed chemical. Therefore, the language would require these businesses to post a warning if they want to avoid potential liability for failure to warn. This type of “protective” warning would only be less “clear,” would do nothing to advise the public of actual exposure risks, and would not promote more certainty among regulated businesses.

The result of this newest incentive to “overwarn” not only will result in inaccurate warnings, but will also feed a new round of litigation concerning alleged exposures to listed chemicals. If businesses are required to include the “will be exposed” language in posted warnings, prospective plaintiffs could claim that the businesses have *conceded* knowing and intentional exposure to a listed chemical for purposes of toxic tort litigation, thereby relieving the plaintiffs of having to prove actual exposure or intent. Conversely, if businesses choose not to warn based on insufficient evidence of actual “exposure,” Prop 65 plaintiffs will sue and challenge businesses to affirmatively disprove any route for “contact” with the listed chemical in all conceivable scenarios.

Moreover, the proposed “will be exposed” language does not promote any interest in protecting public health or disseminating accurate information. Adopting the proposed regulation would require businesses to take down and reissue tens of thousands of warnings throughout the state. The result in public perception is likely to be equal amounts of fear, confusion and disregard.

- Some members of the public, upon seeing this rash of new Prop 65 warnings, will be incorrectly led to believe there has somehow been an increase in exposure risk (*i.e.*, in transitioning from a warning that a product “contains” a listed chemical to a statement that person now “will be exposed”). In that sense, the new warning language promotes unwarranted fear and uncertainty about products that have not undergone any change in their chemical content.

- For other members of the public, it will be impossible to know whether they are truly being “exposed” to a chemical or whether the business in question is warning out of uncertainty or caution. Indeed, OEHHA specifically expressed its concern that the public is already ignoring diluted warnings because of “overwarning” for non-existent exposures – yet the proposed language will only exacerbate that problem as businesses attempt to mitigate their potential liability risk when they cannot prove non-exposure with scientific certainty. The new “will be exposed” language will not provide any guidance on what the public should do to avoid or mitigate exposure; in fact, language saying that the public “will be exposed” suggests that no mitigation is possible, and that the only way to avoid exposure is to avoid the product or area altogether.

- As OEHHA has recognized, Prop 65 warnings are already ubiquitous in California. Most members of the public currently do not avoid gasoline stations, restaurants, and other businesses due to the posting of a Prop 65 warning. If the proposed “will be exposed” language is adopted, it is only a matter of time before the public determines that these warnings, too, bear no relation to any change in actual underlying health risks. The likely
result is that the public will ignore these new warnings as well, defeating OEHHA’s original purpose in promoting more effective and accurate information concerning Prop 65-listed chemicals.

This approach also flies in the face of the reasoned conclusions OEHHA’s predecessor agency made when the Prop 65 warning regulations were first promulgated. The California Health and Welfare Agency (“Agency”) considered and rejected Prop 65 warning statements such as “you are being exposed” or “you will be exposed,” opting instead to require warnings that a listed chemical is present in the area or product, and is known to the State to cause cancer or reproductive harm. See Cal. Health & Welfare Agency, Revised Final Statement of Reasons (Nov. 1988), at 3-4. “[B]y communicating that a listed chemical is present, i.e., that the chemical in question is listed, the fact of potential exposure would normally be implied. It does not appear necessary in every case to specifically state that an exposure will take place.” Id. at 4. The Agency also noted that “[s]ituations may exist in which a business cannot know whether in fact there has been an exposure for each item sold, as in the case of bulk produce. Those situations may warrant special treatment under these regulations.” Id. at 4. Indeed, one of the ways the Agency attempted to provide case-by-case flexibility for businesses was to include “safe harbor” warning language based on the chemical content of the product or area (rather than attempting to prove exposure itself)\(^2\) as an optional, not mandatory, way to satisfy the “clear and reasonable warning” requirement. As the Agency made clear, the proposed safe harbor warning language in the regulations was “not intended to be a warning straight-jacket.” Id. at 8, 33, 39. In contrast, the proposed mandatory “will be exposed” language would contravene this principle by imposing a “one size, fits all” approach required for all businesses to meet the “clear and reasonable warning” requirement, despite those businesses having very different circumstances regarding whether an actual exposure can be proven.

Requiring the “will be exposed” warning language will not provide businesses more “clarity and certainty” as OEHHA claims, nor will it make warnings “more effective.” See ISOR at 6-7. On the contrary, requiring this language will force businesses to “overwarn” far more frequently as a result of an inability to adequately document non-exposure in every possible situation. The public, in turn, will receive a greater number of, and more inaccurate, warnings without any change in underlying health risks, making those warnings far less effective.

**IV. Requiring Disclosure of Certain Specific Chemicals in Warnings Will Not Necessarily Promote Accurate Information or Help Prevent Harmful Exposures**

OEHHA’s proposal to require regulated businesses to specify the name of 12 listed chemicals in Prop 65 warnings (Proposed 27 C.C.R. § 25605) only makes Prop 65 warnings more cumbersome and less likely to be understood, and illustrates the arbitrary nature of picking these particular 12 chemicals and not others. OEHHA claims that it is attempting to satisfy “public interest organizations [that] asked that all listed chemicals be disclosed on the warning itself” (ISOR at 12), but provides no evidence that forcing the inclusion of chemical names on the warning will give the public any more useful

\(^2\) The Agency recognized that creating a safe harbor warning based on chemical content (which is known in most situations) instead of exposure (which is not known in every situation) is what made compliance workable: “if a person in the course of doing business knows that a listed chemical is present in a product or part of a product, and there is no means of providing that the amount poses no significant risk, then some kind of warning or information is required.” Cal. Health & Welfare Agency, Revised Final Statement of Reasons (Nov. 2011), at 31 (emphasis added).
information to understand the nature of their potential exposure, and/or to minimize or avoid it as to the particular product or area involved.

Section 25605 of the proposed regulations would require that, where a warning is being provided for any of the following chemicals, the name of the chemical must be specified in the warning: acrylamide, arsenic, benzene, cadmium, chlorinated tris, 1,4-Dioxane, formaldehyde, lead, mercury, phthalates, tobacco smoke, and toluene. *See Proposed 27 C.C.R. § 25605.* OEHHA notes in the ISOR that Section 25605 is “intended to provide the public with more information directly on the warning concerning exposures to chemicals with names that are commonly understood.” ISOR, p. 12.

WSPA opposes this proposed requirement to require specific listing of certain listed chemicals in the warning. Though OEHHA has stated that it “does not anticipate that warnings will contain more than one or two of the listed chemicals” (*id.*), for certain products several of these chemicals may be present. The requirement that selected chemicals be referred to by name in the warning itself – particularly where a product contains multiple chemicals – will be expensive and burdensome, as each chemical in a product would have to be reviewed separately to determine if an actual “exposure” will occur in every situation and, potentially, all listed on the warning. Creating such a long and cumbersome warning defeats the purpose of ensuring warnings are “clear and reasonable” and likely to be understood by the public.

Perhaps more problematic, OEHHA fails to articulate a scientifically defensible reason to require warnings to name these 12 chemicals and not others. OEHHA simply claims that these chemicals are “commonly found” in consumer products and in occupational and environmental exposures, and have names that are “commonly understood.” ISOR at 12. OEHHA would be hard pressed to prove that chemicals such as “1-4, dioxane” and “chlorinated tris” are somehow “commonly understood” by the general public, and even if they were, OEHHA has provided no studies or evidence showing that the specific disclosure of these chemical names gives the public any useful information about the nature of any given individual’s potential risk of exposure or the ways that individual might reduce or avoid exposure.

Moreover, though OEHHA has said in public workshops on the proposed regulations that it does not intend to require inclusion of every Prop 65 listed chemical on warnings, it has also said that this list “is not exhaustive and may be changed over time as the public becomes more familiar with the improved warning format.” *Id.* OEHHA provides no explanation as to why public familiarity “with the improved warning format” would somehow mean that including more chemical names on the warning would convey useful information to the public about their individual exposure or ways to minimize it. Thus, the proposed regulation would open the door for OEHHA to require, at its whim, other “priority” chemicals to appear on Prop 65 warnings in the future, based only on a similar assertion that such chemicals are “commonly understood.” Designating 12, or 20, or even 100 chemicals that must be named in the warning does not appreciably advance the purpose of Prop 65 in ensuring a “clear and reasonable warning” of potential exposures. Rather, it likely will lead to public misperception that these chemicals somehow represent a greater exposure risk simply due to the fact that they were specifically named.

Requiring indiscriminate inclusion of the chemicals of OEHHA’s choice on Prop 65 warnings would only further burden manufacturers and quickly create a long, unwieldy warning of little actual merit to the public. Indeed, if OEHHA intends to create an online website clearinghouse or database
describing the chemicals in certain products and including information about mitigating or avoiding potential exposures, it is unclear what marginal utility a specific listing of chemicals on the warning would have.

Thus, WSPA urges OEHHA to delete Proposed Section 25605 and not require specific listing of certain chemicals on the Prop 65 warning itself. Current Prop 65 warnings give consumers sufficient notice of a potential exposure to enable them to approach the business and ask for the specific chemical and exposure information if they wish to have it. The fact that the vast majority of the public does not typically ask for that information is a strong indicator that inclusion of specific chemical names is not a feature the general public needs or is demanding to have in its Prop 65 warnings.

V. Quarterly Public Media Prop 65 Warning Announcements Should be Retained to Ensure Warnings Reach Potentially Affected Individuals in an Effective and Efficient Way

OEHHA’s proposal to eliminate the quarterly public media announcement option for environmental warnings is unwarranted and would increase the burden on regulated parties without actually increasing the number of people who receive a warning. Indeed, the change almost certainly will reduce the number of individuals reached with a given warning.

Current Prop 65 regulations allow warnings for environmental exposures to be provided on a quarterly basis either personally or by public media announcements (such as newspaper ads) which target the affected area. See 27 C.C.R. 25605.1(a)(4). (allowing warning “provided by public media announcements which target the affected area . . . made at least once in any three-month period.”) The proposed revised regulations would eliminate the public media announcement option, leaving only the options that the notice either be physically posted or be “mailed, or sent electronically or otherwise personally delivered to each occupant in the affected area.” See Proposed 27 C.C.R. § 25607.15(a)(2). The ISOR states only that the regulation is being updated “to reflect changes in communication technology that have occurred since the original regulation was adopted, while recognizing that some individuals may not have access to current technology.” ISOR, p. 31.

WSPA opposes the elimination of the public media announcement option for issuing warnings of environmental exposures. Many businesses, including WSPA’s members, rely on quarterly public media announcements to assist in Prop 65 compliance. WSPA members have maintained an effective system of quarterly public media announcements for many years without issue as an effective way to complement physical warning signs in areas containing petroleum products. Public media announcements have been an effective and efficient way of warning members of the public who do not have access to current technologies like electronic delivery. Indeed, for many members of the public, newspaper notice is the best and most practical way for the warning to be provided “in a conspicuous manner and under such conditions as to make them likely to be read, seen or heard and understood by an ordinary individual in the course of normal daily activity.” See proposed 27 C.C.R. 25607.15(b). The fact that, as OEHHA notes in the ISOR, “some individuals may not have access to current technology” only militates in favor of continuing to allow mass announcements like newspaper and electronic mass media.

In lieu of mailing or electronic delivery, OEHHA’s proposed regulations would require the warning to be “otherwise personally delivered to each occupant in the affected area.” See Proposed 27 C.C.R. § 25607.15(a)(2). This requirement for personal delivery is not only unduly burdensome on businesses
and potentially unworkable in practice (a company may have no means to personally identify who may be potentially exposed in a given entire area), but directly contravenes the law. Prop 65 statutes are clear that a warning “need not be provided separately to each exposed individual” to be clear and reasonable “and may be provided by general methods such as . . . placing notices in public news media, and the like.” Cal. Health & Safety Code § 25249.11(f).

Accordingly, WSPA urges OEHHA to retain provisions in the proposed regulations allowing quarterly Prop 65 warning announcements to be made in the newspaper for environmental exposures. Such general announcements are practical, cost effective, reach a large population of potentially exposed individuals, are conspicuous and likely to be read and understood in normal daily activity. Moreover, most newspapers reprint their content online, providing the public with a second avenue for receiving general warnings of environmental exposures.

VI. The Requirements for the Proposed “Lead Agency Website” are Vaguely Worded, Extremely Burdensome on Businesses, and Will Create a New Round of Litigation By Bounty Hunter Attorneys

OEHHA’s proposal to create a website supplied with 11 categories of mandated information from regulated businesses (Proposed 27 C.C.R. § 25604) would impose a significant burden on businesses, and is rife with ambiguous language that would not only leave businesses unsure about the extent of information required, but would provide fertile ground for plaintiffs’ attorneys alleging that the businesses’ warnings were not “clear and reasonable” under Proposed Section 25601(a) because the website information submitted was insufficient or incomplete.

Section 25604(a) of the Proposed Regulations would require a business, “for any listed chemical for which it provides a warning pursuant to Health and Safety Code section 25249.6,” to provide a host of information to OEHHA within 30 days of issuing the warning. Many of these categories or required information are ill defined. For example, businesses would be required to provide information on “[t]he anticipated route, routes, or pathways of exposure to the listed chemical for which the warning is being provided,” and “[r]easonably available information concerning the anticipated level of human exposure to the listed chemical, if known.” Proposed 27 C.C.R. § 25604(a)(8), (a)(9). The terms “anticipated” and “reasonably available” are not defined, leaving businesses to guess at how many potential exposure routes or pathways it is required to provide information for, whether unlikely or theoretical routes or pathways must be included, what the “anticipated” level of human exposure would be for every single individual who could possibly come into contact with the listed chemical, whose standard of “anticipation” should be applied to potential exposure routes or pathways (e.g., what the business anticipates? What the general public anticipates? What an average reasonable person anticipates? What a plaintiffs’ attorney anticipates? What OEHHA anticipates?), how much effort businesses need to undertake to locate information on potential human exposure if not already “known” by the business, and whether and when a business may be charged with “knowing” such information even if it does not actually possess it. Determining the “level of human exposure” alone could require businesses to spend hundreds of thousands of dollars conducting detailed studies on how much of a given chemical an average individual may be “exposed” to through all of the possible exposure pathways. Failure to provide even a small part of this required website information potentially could lead to a private cause of action against the business.
The requirement that businesses submit “[i]nformation concerning actions a person can take to minimize or eliminate exposure to the listed chemical, if any” (Proposed 27 C.C.R. § 25604(a)(10)) also is open to a wide interpretation. It is not clear, for example, how detailed businesses must be in identifying “actions a person can take to minimize or eliminate exposure,” whether a business must identify all such possible actions or just some subset, and whether the business must commission studies or undertake costly evaluations to research every possible avenue of mitigation regardless of how arcane or impractical it might be.

Moreover, the Proposed Regulation does not address the time period for which data must be submitted, what information would be deemed to make a business “aware that an exposure to an additional chemical or chemicals for the same . . . exposure requires a warning” such that an information update would be required, and when “any other updates to information required by subsections 1 through 11 are needed.” See Proposed 27 C.C.R. § 25604(c).

The language in Proposed Section 25604 is so vague that it may impermissibly intrude into preempted areas of regulation. The information required in Proposed Section 25604 could be interpreted to require provision of environmental monitoring and occupational exposure monitoring data for listed chemicals. Certain occupational and environmental exposure monitoring is already mandated for other purposes by federal and state requirements (e.g., the federal Occupation Safety and Health Act, the federal Clean Air Act, the federal Resource Conservation and Recovery Act, etc.), which may conflict with or preempt any attempt through the Prop 65 regulations to require employers to collect and submit different data.

Finally, the Proposed Regulations contain no requirements on how OEHHA must manage the website going forward, how often OEHHA must update the website, how much time OEHHA has to add new pieces of information to the website, whether the website must contain all information provided by regulated businesses or just some subset, and whether OEHHA itself is bound to ensure that information provided on the website is complete, up to date, and not misleading. See Proposed 27 C.C.R. § 25604(d).

The inherent vagueness of many of these provisions leaves significant doubt as to how helpful an OEHHA-run website could be for the general public. Posting inaccurate or outdated information on the website could lead to unwarranted alarm, confusion or misunderstandings among individuals looking to the site for information about chemical exposures.

These issues are significant concerns for regulated businesses. Because OEHHA has proposed that a warning cannot be “clear and reasonable” unless it “compl[i]es with all applicable requirements of this article” (Proposed 27 C.C.R. § 25601(a) (emphasis added)), plaintiffs’ attorneys can and would sue businesses for failure to provide a “clear and reasonable” warning based on any alleged failure to provide the full measure of information Proposed Section 25604 could even be interpreted to require. The laundry list of vague and ambiguous terms used in Proposed Section 25604 would provide yet another rich source of claims for bounty hunter counsel to bring against regulated businesses, even those who in good faith provided a significant amount of information to OEHHA, but not more esoteric categories of information alleged by plaintiffs’ counsel to be required.

WSPA cannot support regulations that would lead to such an explosion of litigation opportunities for plaintiffs. WSPA joins the California Chamber of Commerce and other commenters in calling for
consideration of alternative measures allowing for voluntary submittal of information to an OEHHA-run website, and for prohibition of any private rights of action based on alleged failures to provide all categories of information for such a website. These measures would require significant revision to ensure that the end result is not to encourage “frivolous ‘shake-down’ lawsuits.”

VII. The GHS Pictogram Conveys No Useful or Understandable Information to the Public, and Should Not Be Mandated in Warnings

OEHHA’s proposal to require the Globally Harmonized System of Classification and Labeling of Chemicals (GHS) health hazard pictogram (also known as the “exploding chest” symbol) on warnings for consumer products (Proposed 27 C.C.R. § 25607.2(a)(1)), occupational (Proposed 27 C.C.R. § 25607.13(a)(1)) and environmental (Proposed 27 C.C.R. § 25607.16(a)(1)) exposures is unwarranted, unnecessary and very unlikely to be understood by the vast majority of the public. WSPA joins in the comments of the Chamber of Commerce on this point, and agrees that the pictogram requirement should be removed from the proposed regulations entirely.

The GHS pictograms were designed by the United Nations to unify the classification and labeling of chemicals across a wide variety of scenarios and countries, and were not designed to convey the precise warning information required by Prop 65. Indeed, the “exploding chest” pictogram can mean one or more of seven different things as to any given chemical: “Respiratory sensitization, category 1”; “Germ cell mutagenicity, categories 1A, 1B, 2”; “Carcinogenicity, categories 1A, 1B, 2”; “Reproductive toxicity, categories 1A, 1B, 2”; “Specific target organ toxicity following single exposure, categories 1, 2”; “Specific target organ toxicity following repeated exposure, categories 1, 2”; and/or “Aspiration hazard, categories 1, 2.” Some of these hazards bear a relation to the statutory Prop 65 hazards (i.e., a “chemical known to the state to cause cancer or reproductive toxicity”), but others are totally unrelated to Prop 65 hazards. Thus, by definition, the “exploding chest” pictogram is ambiguous and can be construed to denote a hazard that does not trigger a Prop 65 warning at all.

Moreover, though OEHHA asserts that the pictogram has been adopted by OSHA/Cal-OSHA, OEHHA has provided no evidence that members of the public actually would understand the “exploding chest” pictogram. The adoption of the symbol by the GHS and OSHA does not somehow automatically make it a “clear and reasonable” warning for purposes of conveying the specific Prop 65 hazards. The picture itself does not intuitively convey the idea of “carcinogenicity” or “reproductive toxicity” to an individual not readily familiar with the GHS pictograms. For example, individuals might easily misconstrue the “exploding chest” picture to denote risks related to explosion, poison, or heart attack, or even a risk related solely to ingestion of the chemical. Most members of the public will not understand the meaning of the pictogram, and its only function in a Prop 65 warning would be as surplus material very likely to alarm and confuse the public.

VIII. The Proposed Methods of Transmission For Environmental Exposure Warnings are Prohibited By Statute and Would Impose Unacceptable Burdens on Business

OEHHA’s Proposed Regulation mandating the methods for transmitting environmental exposure warnings (Proposed 27 C.C.R. § 25607.15) would require businesses to take actions that are flatly prohibited by statute or that would entail impossible burdens. The proposed requirement that warnings of environmental exposures be “mailed, or sent electronically or otherwise personally delivered to
each occupant in the affected area” directly violates Section 25249.11 of the Health and Safety Code, which states that warnings “need not be provided separately to each exposed individual and may be provided by general methods . . . provided that the warning accomplished is clear and reasonable.” Health & Safety Code § 25249.11(f). OEHHA cannot mandate separate individual warnings and cannot promulgate this proposed requirement.

Moreover, the requirement that regulated businesses provide a warning “in English and in other languages commonly spoken in the area” is inherently vague, extremely burdensome on business, and impossible to implement or enforce – all of which will lead to further opportunities for bounty-hunting plaintiffs’ attorneys to litigate. The term “commonly” is undefined, which means that business will have no way of knowing what number of speakers in an area makes a language “commonly spoken.” Plaintiffs’ counsel could allege, for example, that businesses must commission studies to determine what languages are spoken in a given area, update that research frequently, and update warning languages to reflect those that plaintiffs’ counsel feels are “common.” Failure to do this could lead to claims that the business has violated Proposed Section 25607.15. Businesses would then face the impossible choice of guessing at which languages are “common” enough and issuing warnings in those languages, performing expensive research to determine what languages are spoken and then selecting an arbitrary number to define which languages are “common,” or simply having to issue warnings in all languages spoken by more than one household in a given area.

WSPA cannot support the vaguely worded requirement to provide warnings in “commonly spoken” languages. The requirement would force reissuance of warnings in a yet-to-be undetermined number of languages, and plaintiffs’ counsel could require businesses to spend thousands of dollars finding out what languages are spoken in each area before the business issues warnings (and counsel could still sue the businesses claiming that they omitted one or more minor languages they claim still qualify as “common”).

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WSPA thanks you again for considering our comments on these important issues regarding the proposed Prop 65 warning regulations. It is critical that any changes to the Prop 65 warning regulations do not create impossible or impractical liabilities for industry. The regulations must provide certainty for businesses that adoption of certain “safe harbor” warning language will both be legally sufficient for compliance and not force businesses to make statements that are inaccurate or that could force them to incur additional liability. OEHHA has an obligation to work with industry and other stakeholders to adopt regulations that meet these requirements, that are workable, and that reduce the incentive for litigation instead of increase it. We look forward to working with OEHHA in addressing the issues raised above and implementing appropriate changes in the next draft of proposed warning regulations.

Sincerely,

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