AmericanCoatings ASSOCIATION℠

January 3, 2024

Mrs. Monet Vela
Office of Environmental Health Hazard Assessment
1001 I Street, 23rd Floor
Sacramento, CA 95812-4010

Via portal at: https://oehha.ca.gov/comments

SUBJECT: COMMENTS REGARDING REVISED PROPOSED AMENDMENTS TO ARTICLE 6, CLEAR AND REASONABLE WARNINGS SHORT-FORM WARNINGS, OCTOBER 2023 PROPOSAL

Dear Mrs. Vela,

The American Coatings Association ("ACA")[1] appreciates the opportunity to comment on the proposed amendments to short-form warnings under Article 6 of regulations implementing the *California Safe Drinking Water and Toxic Enforcement Act* (hereinafter, "Prop. 65"). We are committed to working with OEHHA to help ensure accurate disclosure of information to enhance consumer safety and to inform consumer product selection. Being manufacturers of formulated products, ACA members have carefully analyzed issues related to labeling requirements and safety to provide downstream users with information to enable safe use of products.

The Association's membership represents 90% of the domestic paint and coatings industry, including downstream users (or processors) of chemicals, as well as chemical manufacturers. Our membership includes companies that manufacture paint, coatings, sealants, adhesives and raw materials that go into formulation. ACA members will be directly affected by OEHHA's proposed changes to short-form warnings. Similarly, our membership is concerned about the utility of this proposal. ACA is eager to assist OEHHA

[1] ACA is a voluntary, non-profit trade association working to advance the needs of the paint and coatings industry and the professionals who work in it. The organization represents paint and coatings manufacturers, raw materials suppliers, distributors, and technical professionals. ACA serves as an advocate and ally for members on legislative, regulatory and judicial issues, and provides forums for the advancement and promotion of the industry through educational and professional development services.

to improve label information, where necessary, so consumers are meaningfully informed about product safety prior to making purchasing decisions.

ACA appreciates OEHHA's willingness to interact with stakeholders. ACA appreciates that implementation of Prop. 65 presents several challenges, and we commend OEHHA on its efforts. We are optimistic that through continued involvement with the public and stakeholder community, OEHHA will successfully implement a viable and effective labeling program.

I. Introduction

On October 27, 2023, OEHHA issued the current proposed revision to Prop. 65 warnings, proposing:

- Listing of at least one chemical for each toxicity endpoint in a short-form warning.
- Allowing variations of the phrase "WARNING" to indicate a warning is for compliance in California.
- Requiring minimum font size of 6-point font.
- Requiring Prop. 65 internet warnings for internet purchases.
- Requiring Prop. 65 warnings in catalogs for catalog purchases.
- Requiring warnings on vehicles and vehicle parts.
- Requiring warnings on recreational marine vessels and parts.

The current proposal is a modification of a similar proposal OEHHA initially published in January 2021, with subsequent revisions. ACA appreciates OEHHA's willingness to consider stakeholder perspectives to modify its prior proposal. With the January 2021 proposal, OEHHA proposed to address overuse of Prop. 65 short form labels by amending short-form label text, eligible package size and font requirements. OEHHA also proposed requiring identification of at least one Prop. 65 chemical for each toxicity endpoint included in a Prop. 65 warning.

ACA remains concerned that the rule would not provide additional information to inform consumers about chemical risks associated with products when a product is labelled according to federal chemical safety laws, while imposing significant costs. A large sector of industry already provides consumers with labels and accompanying information identifying chemical ingredients, instructions for safe use and risks associated with products. In effect, addition of a Prop. 65 listed ingredient to a label would not add to a consumer's understanding of risks associated with formulated products. OEHHA's proposed rule is not narrowly tailored to address a clearly defined issue, in effect imposing a labeling change for products that already clearly provide consumers with relevant information.

Products labeled according to the *Federal Hazardous Substances Act* for consumer products include chemical identity of main contributors to hazards associated with the product, as required by law. Regarding work place products, hazardous ingredients are readily available online for most formulated products made available to consumers. Together with the current Prop. 65 short-form warning, these label elements avail consumers of information to select products based on potential human health or environmental risks.

California's Administrative Regulations provide criteria for "necessity" of regulations. Specifically, the section requires:

> [T]he record of rulemaking proceeding shall include:
>
> (1) A statement of the specific purpose of each adoption, amendment, or repeal; and
>
> (2) **information explaining why each provision of the adopted regulation is required to carry out the described purpose of the provision.** Such information shall include, but is not limited to, facts, studies, or expert opinion. **When the explanation is based upon policies, conclusions, speculation, or conjecture, the rulemaking record must include, in addition, supporting facts, studies, expert opinion, or other information.** An "expert" within the meaning of this section is a person who possesses special skill or knowledge by reason of study or experience which is relevant to the regulation in question.
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> (Cal. Code of Reg. Title I, Section 10, bold font added)

In contradiction to this section, OEHHA has not provided supporting facts and data justifying an amendment. ACA recommends conducting additional analysis to understand the extent of over warning and potential causes of over warning. OEHHA also has not considered extensive information that product manufacturers provide related to hazardous chemicals under federal law. OEHHA must conduct further analysis to justify costly and burdensome changes to Prop. 65 warnings that in ACA's view would be redundant and unnecessary for a broad range of products that already provide relevant information about hazardous ingredients.

ACA members' products are not the subject of California consumer inquiries, due to the detailed information provided on labels and/or available on a Safety Data Sheet regarding safe use of products, potential risks, chemical ingredients, warning statements, etc. OEHHA has not considered the extent of information provided to consumers for these products. In effect, the proposed change does not enhance a consumer's understanding of product safety or potential risks of formulated products, but it would subject manufacturers to costly labeling changes and increased potential for misguided lawsuits based on new

labeling requirements. Moreover, the alleged problem of over-warning has not been clearly established and is assumed without adequate supporting data, in contradiction to California's administrative code.

I. The current Prop. 65 proposal should not apply to products labeled according to federal hazardous chemical labeling requirements

ACA strongly recommends that OEHHA allow continued compliance with the current short-form warning safe harbor when a product is labelled according federal laws for hazardous substances. This allowance would apply to consumer products complying with the OSHA Hazard Communication Standard (29 CFR 1910.1200) or the *Federal Hazardous Substances Act* (16 CFR 1500, label elements at 1500.121), in lieu of compliance with the proposed short-form changes. **If the allowance is adopted, OEHHA would *not* implement a blanket exemption from the proposed Prop. 65 warning. Rather, the allowance would narrowly tailor the proposed rule to articles that seem to be the focus of OEHHA's concern, although data does not clearly establish that over-warning is a problem even for these products.**

Manufacturers of formulated products often design labels to comply with both federal requirements (OSHA and FHSA), often in both English and Spanish. The allowance would avoid unnecessary and significant costs and material waste associated with revising product labels, just as industry is recovering from OEHHA's last Prop. 65 label change taking complete effect at the end of August 2018.

ACA suggests the following modification to Section 25603, as proposed, by adding a new sub-paragraph (e):

> "(e) consumer products labelled according to the *Federal Hazardous Substances Act* or the *OSHA Hazard Communication System* (29 CFR 1910.1200) can provide one or more of the following warning statements instead of those listed in section (b)(3):
>
> (1) For exposures to listed carcinogens, the words, "Cancer -- www.P65Warnings.ca.gov."
>
> (2) For exposures to listed reproductive toxicants, the words, "Reproductive Harm -- www.P65Warnings.ca.gov."
>
> (3) For exposures to both listed carcinogens and reproductive toxicants, the words, "Cancer and Reproductive Harm -- www.P65Warnings.ca.gov."

a) A limited exemption would more appropriately address OEHHA's concerns related to products whose labels do not include detailed safety information

OEHHA's proposal attempts to address two issues:

1) consumer inquiries related to chemical identity in products; and

2) overuse of Prop. 65 warning language where presence of a listed chemical may be unknown.[2]

OEHHA's documentation of consumer inquiries does not include inquiries regarding formulated products. In effect, the proposal is not justified for formulated products. More generally, OEHHA has not provided adequate justification when applying the proposal to articles (or products that are not chemically formulated products) due to the relatively low number of consumer inquiries requesting chemical identity. Regarding potential over warning, OEHHA has not provided analysis or related documentation establishing the extent of over warning, nor has OEHHA considered the role of citizens' lawsuits as a motivating factor, to the extent over warning is a problem.

Disclosures from OEHHA show that consumer inquiries requesting information about chemical ingredients relate to articles, not to formulated products. In response to a *Public Records Act* request, OEHHA disclosed a list of consumer inquiries related to Prop. 65 short-form warnings. Of the approximately 4,900 inquiries summarized in the disclosure, **ACA did not identify inquiries related to paint, coatings, sealants, adhesives, or other formulated products. Inquiries identify articles.**

OEHHA should further consider that only 18% of the 4,900 inquiries requested chemical identity.[3] Based on OEHHA's disclosures of about 4,900 Prop.65-related inquiries over a year, this would result in 617 inquiries requesting chemical identity. To base such a broad-reaching change in short-form warnings on these 617 inquiries is unconscionable, especially when considering these inquiries relate to articles and not formulated products.

In its most recent Statement of Reasons OEHHA provides two examples of consumer inquiries relating to a bidet and an electric kettle. These articles are not subject to the extensive disclosures and safety instructions mandated under federal law for chemically formulated products. It is understandable that a consumer might inquire about Prop. 65 labels on these articles since they are not accompanied by additional information required for chemically formulated products. Products manufactured by ACA members are different and should not be grouped with articles.

[2] See OEHHA, *Statement of Reasons*, p. 4-6, Jan. 2021, available online at: https://oehha.ca.gov/media/downloads/crnr/p65shortformisorf2021.pdf
[3] OEHHA, *Statement of Reasons*, p. 6, Jan. 2021, available online at: https://oehha.ca.gov/media/downloads/crnr/p65shortformisorf2021.pdf

b) Products labelled in compliance with OSHA Hazard Communication and / or FHSA convey more meaningful information for safe use than merely identifying a chemical ingredient.

With information necessary to assess risk and use a product safely, the Prop. 65 label on formulated products serves as a secondary warning. Naming a Prop. 65 listed chemical for each toxicity endpoint would not provide the consumer with meaningful information to significantly affect consumer choice, as related to formulated products.

Under the FHSA, formulated products marketed to consumers must include labels with identity of hazardous substances, signal words, hazard statements, precautionary statements, first aid instructions, special care and handling instructions, etc., as required at 16 CFR 1500.121. Similarly, the OSHA Hazard Communication Standard, for commercial and industrial products, requires signal words, hazard statements, precautionary statements and pictograms, as required at 29 CFR 1910.1200. Products labeled according to OSHA Hazard Communication are accompanied by Safety Data Sheets with information about chemical composition and hazardous substances. Manufacturers of formulated products often comply with both sets of requirements in two or more languages, making label changes costly and difficult to design. Safety Data Sheets for most products are also available online, so consumers have access to additional details on the SDS in addition to information on a product label.

c) To address unwarranted use of Prop. 65 warnings on some consumer products, OEHHA must address the role of litigation in proliferating Prop. 65 warnings on products

In its Statement of Reasons, OEHHA states that product manufacturers may use Prop. 65 short form labels, even where a manufacturer may not have knowledge of a Prop. 65 chemical in its product. To the extent that overuse is a problem, the threat of civil suits for failure to warn may be a driving factor. ACA recommends OEHHA gather additional information to comprehensively understand the perceived problem of over warning to address the issue in an effective manner, possibly through modifying litigation procedures. Because of the level of sophistication of the formulated products industry, an amendment to Prop. 65 designed to stop over warning for this group of products is not necessary.

OEHHA's proposal is more likely to increase litigation rather than curb litigation. With a requirement to identify one chemical for each Prop. 65 toxicity endpoint, plaintiffs now have the opportunity to sue for both overwarning and underwarning, whereas the current focus of lawsuits is underwarning. This is not likely to encourage accuracy in labeling. Instead, it ensures that plaintiffs have wider grounds to bring lawsuits against any product, while product manufacturers struggle to find a feasible pathway to compliance.

The proposal would also encourage litigation where a manufacturer has decided to exclude a Prop. 65 warning for one toxicity endpoint, but not the other, due to negligible exposure.

For example, exposure may be significantly below an NSRL (no significant risk level) or an NOEL (no observable effect level) or the company has otherwise established that a product would not expose an individual to a Prop. 65 listed chemical. In such instances, a manufacturer would be forced to defend its label in costly litigation. Here, the threat of litigation encourages over labeling rather than accurate labels that exclude warnings due to negligible or no exposure.

II. OEHHA proposes an unduly burdensome labeling change

The proposed amendment results in an unduly burdensome requirement, considering costs and adequacy of current label information. Relabeling is a time-consuming and costly process. Manufacturers recently completed label updates to comply with OEHHA's 2016 Prop. 65 amendments, coming into effect in August 2018. Based on these label updates, one medium-sized manufacturer documents costs to revise labels of about 500 products at $800,000. In addition to this relabeling expense, the company devoted about 3,000 hours of work, being an additional expense. Many ACA members would need to revise thousands of product labels using sophisticated algorithms or by revising labels manually. Either method is costly and time consuming. OEHHA provides an unreasonably low cost estimate of $4,273.46 per business.[4]

The ACA member's estimate above of $800,000 is for 500 products. Many ACA members would manufacture thousands of affected products. Compliance costs will typically be greater than $800,000. Based on prior experience, one member estimates costs at around $3 million. This company would need to update label plating templates at $250 per product across several thousand products, resulting in a cost of around $2 million. The company would also dispose of pre-ordered label stock for products that would be manufactured after the implementation date at a cost of $875,000. The upfront compliance cost would be roughly $3 million, and this does not include labor costs associated with relabelling.

Some companies also recently completed another costly label update to comply with *California's Cleaning Product Right to Know Act of 2017*, with labeling requirements taking effect in January 2021. With manufacturers already conveying information related to hazards to consumers, OEHHA's proposal brings no additional information of real value to the consumer, while imposing yet another costly label update on manufacturers.

These costs are not limited to manufacturers of consumer products. Manufacturers of industrial and commercial products often choose to label using safe-harbor statements. Manufacturers use the warning to provide a clear statement related to Prop. 65 thereby addressing questions from downstream users up front. Manufacturers may also use Prop.

[4] OEHHA, *Initial Statement of Reasons*, page 46 (Oct. 27, 2023).

65 safe harbor language in case an industrial or commercial product is inadvertently sold to a consumer by a downstream distributor or retailer.

The timing of changes provides further difficulties. OEHHA's proposed mandate of new short-form warnings two-years from the effective date[5] is not enough time to design, print and affix labels across hundreds to thousands of products per manufacturer. Assuming label changes could be accommodated, although this is highly unlikely, manufacturers would need at least five years to evaluate, redesign labels and incorporate them on to products. ACA appreciates the unlimited sell-through of products manufactured prior to the date proposed changes would be required.

III. Changes in raw materials supply do not allow for listing of a Prop. 65 listed ingredient on a label

Manufacturers of formulated products must rapidly respond to changes in supply of raw materials by modifying formulations. Fluctuations and changes in raw materials supply are common in the chemicals marketplace. Chemical ingredients listed as Prop. 65 chemicals can change frequently. Manufacturers cannot update identification of a Prop. 65 listed chemical on a label to keep up with these changes.

Here, the federal labeling program under the *Federal Hazardous Substances Act* has a clear advantage. This labeling program requires labeling of ingredients that are the main contributors to hazards associated with a formulated product, being a chemical mixture. OSHA's Hazard Communication system similarly requires the listing of hazardous ingredients on a safety data sheet, typically available to consumers online. Due to unique considerations of chemical supply and currently available information about chemical ingredients, ACA strongly recommends that OEHHA allow manufacturers of formulated products to comply with the current short-form warning requirements that do not require identification of a Prop. 65 listed chemical.

IV. The current proposal would affect workplace products regardless of the allowance for OSHA Haz Com in existing Prop. 65 regulations

In Section 25606 of the Prop. 65 Regulations (27 CCR § 25606), OEHHA stipulates that workplace warnings that meet the OSHA Hazard Communication standard for a Prop. 65 listed chemical satisfy the warning requirement of Prop. 65.[6] This section does not

[5] Section 25603(c) as proposed, OEHHA Proposed Changes to Regulatory Text, Oct. 27, 2023.

[6] 27 CCR § 25606 mandates, "A warning to an exposed employee about a listed chemical meets the requirements of this subarticle if it fully complies with all warning information, training, and labeling requirements of the federal Hazard Communication Standard (29 Code of Federal Regulations, section 1910.1200 (Feb. 8, 2013)), hereby incorporated by reference, the California Hazard Communication Standard (Title 8, California Code of Regulations section 5194), or, for pesticides, the Pesticides and Worker Safety requirements (Title 3, California Code of Regulations section 6700 et seq.)."

completely address ACA's concerns related to formulated products. Manufacturers of formulated products face significant labeling challenges since their products can be distributed to consumers and places of employment. Manufacturers often do not control downstream distribution. To minimize risk, manufacturers often design labels to meet requirements for both consumer products (under the FHSA) and work places (under the OSHA Hazard Communication Standard). The scope of OEHHA's proposal will affect workplace products prepared for mixed consumer and work place markets. Because of these complications, an allowance to comply with the current short-form warning would be appropriate, and it would not compromise the quality of information provided to consumers.

V. Use of the phrase "may contain" in the short-form warning addresses trace amounts and volume changes due to changes in chemical supply

ACA strongly recommends that OEHHA provide an allowance for continued compliance with the current short form warning, since listing a chemical ingredient would not enhance a consumer's understanding of risks associated with a product. As noted above, identifying a Prop. 65 listed chemical is not feasible due to changes in supply chain and costs. Nonetheless, if OEHHA deems it appropriate to proceed with the proposal, we request that OEHHA provide an alternative phrasing to the short-form language as follows:

"May contain [name of chemical], a (carcinogen / reproductive toxin). See www.P65Warnings.ca.gov," or

"May expose you to [name of chemical], a (carcinogen / reproductive toxin). See www.P65Warnings.ca.gov."

These changes more accurately account for *de minimis* amounts or contaminant levels in raw materials or even waterways that are brought into a product, triggering a Prop. 65 warning statement. In such instances, the proposed warning statement would mislead consumers by identifying a Prop. 65 listed chemical, although contained at trace levels. Use of the phrase "may contain" provides some level of accuracy so consumers are notified of a chemical's potential and fluctuating presence. When making a purchasing decision, a consumer can easily review other label information on a formulated product to identify any risks associated with the product.

VI. ACA request flexibility for font size requirements to accommodate small containers

Some ACA members manufacture small vials of paint where 6-point font, the minimum proposed font size for short-form warnings, would be the largest warning on the product label, assuming a small label can accommodate a 6-point font warning. ACA members are concerned that a Prop. 65 warning that is larger than other label text, will mislead

consumers by focusing attention on the Prop. 65 warning over instructions for safe use included according to federal law.

The proposed 6-point font size does not harmonize with federal font size requirements under the FHSA. The FHSA stipulates minimum font size based on area of the principle display panel, specified at 16 CFR 1500.121(c)(2), Table 1. Some ACA members manufacture craft paints with a principle display panel of 2 to 5 inches squared. Minimum font size under the FHSA for this size is 0.0625 inches. With a 6-point font, the Prop. 65 warning would be significantly larger at 0.083 inches. To address these concerns ACA requests that OEHHA allow continued compliance with the current short-form font size requirements, requiring warning be clear and conspicuous in relation to other label language.[7]

VII. Conclusion

OEHHA proposes an amendment to Prop. 65 short-form warnings that would unnecessarily change labels on products already providing information about hazardous chemical ingredients under federal labeling requirements. Prop. 65 labeling provides supplementary notification regarding Prop. 65 listed chemicals, but these warnings are not paramount to safe use of a product or informing a consumer of potential risks prior to purchase. OEHHA has not fully considered the complexities of labeling chemically formulated products in its Statement of Reasons. Consideration would include more accurate analysis of the need for regulatory change, accurate estimation of costs, consideration of limited label space, consideration of information currently provided enabling safe use of a product and barriers to identification of Prop. 65 listed chemicals from supply changes.

Consistent with the above comment, ACA recommends:

- Rescinding the proposal to further analyze extent of over warning, related causes, and the role of litigation in promoting over warning, if over warning is indeed a problem.
- If OEHHA deems finalizing this proposal appropriate, ACA strongly suggests a limited allowance so consumer products that comply FHSA labeling requirements or the OSHA Hazard Communication Standard, are allowed to comply with Prop. 65 short form warnings currently in effect.

[7] 27 CCR Section 25603.

ACA appreciates the opportunity to comment on this matter. We would welcome the opportunity to discuss this matter further with OEHHA. Please feel free to contact me if I can provide any additional information.

Sincerely,

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