

ALSTON & BIRD LLP

1121 L Street, Suite 700
Sacramento, CA 95814

916-498-3305
Fax: 916-441-5449
www.alston.com

FMaureen F. Gorsen

Direct Dial: 916-960-6446

maureen.gorsen@alston.com

March 29, 2021

Ms. 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>

Re: Proposed amendments to short form Proposition 65 warning
[Notice of Rulemaking to Amend Article 6 dated January 8, 2021]

Dear Ms. Vela:

On behalf of The Adhesive and Sealant Council, we are providing these comments in hopes that OEHHA will abandon this ill-timed proposed rulemaking and instead work with us to improve the P65 warnings website, <https://www.p65warnings.ca.gov/>. This is a far better use of the state's and industry's resources and will do vastly more to improve the understanding of the risks of exposure to every California consumer when they purchase our products.

Who Are We?

The Adhesive and Sealant Council members sell products in the state of California that help the state achieve its environmental policy goals. By their application, adhesives and sealants are energy savers. They enable the construction of more energy-efficient homes and commercial buildings, such as through air sealing. They also ensure vehicles meet or exceed strict government light-weighting standards, reducing the use of fossil fuels, by displacing heavier mechanical fasteners. Adhesives and sealants are often much stronger than mechanical fasteners, lengthening a product's life cycle and reducing waste and consumption of valuable natural resources.

Key Background Facts

Our members make very useful products that often come in teeny, tiny packages, cylinders or tubes. These very useful products contain a complex mixture of chemicals. There is only so much space on our product packaging to communicate to consumers, whereas there is a near infinite amount of space - a googol or unfathomable amount - on

the Internet. Our members just spent multiple millions to revise all their packaging a mere three years ago when OEHHA changed the Prop 65 warning in 2018. The major innovation in that change was the addition of the P65 warnings website, <https://www.p65warnings.ca.gov/> to the product label itself.

This proposed rulemaking should be abandoned because it is unnecessary.

There was not a single commenter in favor of this proposed rulemaking at the hearing. Indeed, there is an absence of any public outcry. It appears that the only justification for this proposed rulemaking is that OEHHA gets too many phone calls.

This rulemaking will not reduce the number of phone calls made to OEHHA. Whether reading the long form or short form warning, consumers basically want to know “will I get cancer” if I buy this product. Neither the long form nor short form warning answer this fundamental question.

The statute itself makes this a difficult question to answer as the answer is complicated toxicological assessment based on exposure and use of product.

The proposed additions to the wording on the product label will not answer this question and thus calls to OEHHA will continue as they always have, long before the 2018 change in warning language. OEHHA’s major innovation in 2018 rulemaking was the addition of P65Warnings website. Rather than continue with this proposed rulemaking and causing massive costs to add a few words to product labels that will do little to help consumers answer this question, OEHHA should focus on improving and making more robust the www.p65warnings.ca.gov website and directing consumer questions, phone calls and inquiries to it.

The proposed rulemaking should be abandoned because it violates the Administrative Procedure Act (APA) standards.

The California Administrative Procedure Act (“APA”), Cal. Gov. Code §11346 *et seq.*, establishes basic minimum criteria that new regulations must meet.

This rulemaking, as described above, fails to meet the first test of “necessity.” Cal. Gov. Code §11349(a). The record of this rulemaking fails to demonstrate by substantial evidence the need for this proposed regulation, and is not “reasonably necessary to effectuate the purpose of the statute.” Cal. Gov. Code §11342.2.

This rulemaking also fails to meet the test of “clarity.” Cal. Gov. Code §11349(c). The proposed rule language conflicts with the agency’s description of its effects, and leaves far too much open for interpretation, being vague, ambiguous and overbroad. OEHHA has provided no methodology for selecting a chemical for the short form product warning label. The long form warning adopted in 2018 also fails this test,

and this regulatory flaw should not be carried over to the short form warning as well. Caulks and sealants are complex mixtures. Individual chemicals behave differently in different mixtures and by matrix. Without a methodology for selecting a single chemical from this mixture or matrix for printing on the label, the proposed regulation leaves too much undefined, creates too many possible interpretations and would be inopposite to the intended effect of informing consumers about potential exposures.

The proposed rule also violates the “authority” and “nonduplication” standards, but most critically it violates the APA because its costs are not “justified by the benefit to human health, public safety, public welfare, or the environment. Cal. Gov. Code §11362.2(b)(6)(B).

For one of our members, a small company with only 203 SKUs, the cost to revise their labels to comply with the 2018 rulemaking changes was over \$650,000. This included; (a) new packaging dies and plates, (b) regulatory agency reviews, (c) printing and proofs, (d) costly updates to all our product safety data sheets, and (e) disposal of products with incorrect labels. This cost did not include internal costs such as the marketing components, communication to our customers, controlling our inventory, additional space for the extra inventory, among others.

For another small company with over 500 SKUs, the cost to revise their product labels to comply with the 2018 changes was over \$800,000. OEHHA’s 2018 warning label revisions of 2018 required over 3,000 hours of labor a mere 2.5 years ago.

OEHHA states that the principal benefit of the proposed regulations is “to improve the quality of information provided in Proposition 65 consumer-product warnings by ensuring all safe-harbor warnings name at least one listed chemical to which the user of the product can be exposed.” OEHHA Initial Statement of Reasons (ISOR), p. 15.

For this benefit of “improving the quality of information” for consumers”, OEHHA considered exactly one alternative. It considered “repealing the short form warning provisions entirely. ISOR, pp. 15-16. Really? That doesn’t seem to be a remotely reasonable alternative where the stated goal of the proposed rulemaking is “to improve the quality of the information.”

The APA requires that an agency provide:

“[a] description of reasonable alternatives to the regulation and the agency’s reasons for rejecting those alternatives. Reasonable alternatives to be considered include, but are not limited to, alternatives that are proposed as less burdensome and equally effective in achieving the purposes of the regulation.”

Cal. Gov. Code §11346.2(b)(4) (A).

And, in particular, the APA requires an agency to include “[a] description of reasonable alternatives to the regulation that would lessen any adverse impact on small business and the agency’s reasons for rejecting those alternatives.” Cal. Gov. Code §11346.2(b)(4) (B). Moreover, the APA requires the agency to provide “[f]acts, evidence, documents, testimony, or other evidence on which the agency relies to support an initial determination that the action will not have a significant adverse economic impact on business.” Cal. Gov. Code §11346.2(b)(4) (B).

A reasonable alternative to this proposed rulemaking that would meet all the APA standards - would improve the quality of information that consumers receive, be equally if not more effective, less burdensome and lessen the adverse impact on small business – a true win-win – is to make the P65 warnings website which the current short form warning directs consumers more robust so that they may be able to understand what the warning is truly alerting them about their potential risk of exposure.

The proposed rule requires study under a full environmental impact report under the California Environmental Quality Act (CEQA).

As a court recently ruled regarding the proposed rulemaking to list spray polyurethane foam as a priority product, proposed rulemakings have the potential to create massive environmental impacts on the global supply chain. For instance, there are only two cartridge manufacturers in the US and in-house wrap label capacity for most of our members and indeed most manufacturers is limited. Thousands of products will require relabeling, doubling the use of inks, and resulting in massive solid waste disposal from all the packaging recently updated in 2018 that will now need to be replaced. OEHHA will need to analyze these impacts as well as the impacts on public health and the environment when consumer deselect sealants and caulks, lowering energy efficiency of buildings and increasing water leaks, particularly where the individual chemicals merely present in caulks and sealants pose no toxicity risk in the mixture or matrix used by the consumer. Among other topics, the CEQA analysis must analyze the impact of this global impact on climate change, air quality, water quality and solid waste disposal from this proposed rulemaking.

The proposed rulemaking should be abandoned as the proposed size limitation is unworkable.

The short form warning adopted by OEHHA in 2018 adequately considered packaging size. The proposed revision to this rule is unworkable and OEHHA should stick with the solution they adopted in 2018.

There is limited space on the standard package size for caulks and sealants (a 10.5 oz cylinder cartridge.) Currently, our products must have the following printed on each package, many with minimum size requirements:

1. Warnings required under Federal regulations (e.g., Fair Packaging and Labeling Act, the Federal Hazardous Substances Act, the Labelling of Hazardous Art Materials Act, OSHA Hazard Based Communications, the Globally Harmonized System of Classification (GHS) and California Air Resources Board's Consumer Product VOC regulation, in addition to the required directions for safe use, storage, and disposal.)
2. Product use information in English and Spanish
3. Size of product
4. Company contact information
5. Branded product name
6. Manufactured country statement
7. UPC code
8. Transportation restrictions
9. Marketing copy.

All our member companies have customer service lines. They receive phone calls about the products and the warning and wording on the labels. By and large, the most requested information by consumers from this above list is number 9 – marketing copy. Consumers want to know whether the sealant or caulk they are buying will seal or caulk whatever it is they are seeking to seal or caulk.

OEHHA Should Focus on Improving the P65 Warnings Website

It is not possible in the long form or a longer form of the short form as proposed in this rulemaking to adequately convey the potential exposure risks to a consumer. Rather than add a few words to the short form warning, OEHHA would better meet its stated objective of “improving consumer information” by building on its great 21st century innovation made in 2018 to the warning requirement and focusing on improving the P65 warnings website, <https://www.p65warnings.ca.gov/>.

For example with our member's products, the many factors that could result in consumer exposure can be addressed in depth on the website. The product label would never be able to inform the consumers of the comparative exposure potentials depending on where and how they utilize our products, e.g., on the interior versus the exterior. Our members caulks and sealants are available for use interior and exterior. For example, an interior caulking job would have the following variables:

1. The thickness of the applied caulking bead.
2. Amount of caulking used.
3. The size of the room.
4. The air exchanges in the room.
5. The windows in the room.
6. Whether or not windows are open, and air is flowing through the room.
7. Temperature of the room.

8. Amount of humidity in the room.
9. Whether the caulking was painted or allowed to skin-over or cure.
10. Personal protective equipment used, if any.

The exposure calculations for exterior use of caulks and sealants are as complex to determine. The rate of release of emission of chemicals is widely variable and dependent on multiple factors. To truly improve the quality of the information that consumers get about their risks of exposure, the P65 warnings website, <https://www.p65warnings.ca.gov/> is the ideal place to direct consumers who are calling OEHHA with questions. Indeed, the existing 2018 short form warning does just that.

For all the above reasons, this proposed rulemaking should be abandoned and work on improving the quality of information at <https://www.p65warnings.ca.gov/> should commence.

Sincerely,

A handwritten signature in cursive script, appearing to read "Maureen F. Gorsen".

Maureen F. Gorsen
ALSTON & BIRD LLP

Cc: Bill Allmond