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June 6, 2016

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Sacramento, CA 95812-4010

***Sent Electronically to:*** [P65Public.comments@oehha.ca.gov](mailto:P65Public.comments@oehha.ca.gov)

**SUBJECT: CLEAR AND REASONABLE WARNING ARTICLE**

Dear Ms. Vela:

The California Hotel & Lodging Association and the California Association of Boutique & Breakfast Inns (collectively **CH&LA**) appreciate the opportunity to submit comments regarding OEHHA's May 18, 2016, "Notice of Modification to Text of Proposed Article, Proposed Repeal of Article 6 and Adoption of New Article 6 - Proposition 65 Clear and Reasonable Warnings" (**Notice**) and modified regulatory text dated March 20, 2016.

CH&LA does not intend to comment here on the modified regulatory text referenced in the Notice, other than to renew our request to amend the definitions of "Affected area" and "Consumer product" since the new definitions remain vague and unclear and will lead to continued and increased frivolous litigation.<sup>1</sup>

CH&LA's comments below focus on the following statement in the Notice:

OEHHA also intends to continue to adopt additional provisions in the Article that address specific exposure situations such as exposures that occur at hotels and apartments, which will supplement the existing regulatory proposal and become effective during the two-year phase-in period for the Article. Businesses are encouraged to work with OEHHA staff to develop such tailored warnings where they are needed. (Emphasis added.)

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## **Specific Comments** <sup>ii</sup>

1. First of all, CH&LA is very pleased that the language above appears in the Notice. Since OEHHA first announced in 2014 that it was developing new Clear and Reasonable Warnings regulations to replace the current Article 6 (**Current Article**) with a new Article 6 (**New Article**), CH&LA has sought to make sure that the New Article establishes a sensible and practical methodology specifically tailored for hotels and other transient lodging establishments (**Hotels** or **Hotel**).

CH&LA's comments below deal solely with environmental exposures, and they are submitted in anticipation of working with OEHHA in the near future to develop and adopt Hotel-specific warning provisions in the New Article. CH&LA respectfully requests that OEHHA communicate with CH&LA as soon as it is ready to adopt Hotel-specific warning provisions for the New Article.

2. CH&LA has been meeting and communicating for approximately two years – both formally by means of the submission of written comments in this rulemaking procedure, and informally through various communications and meetings with OEHHA staff – to ensure that the New Article contains a hotel-specific process that is practical, reasonable, and effective. CH&LA's efforts in this regard have resulted in the inclusion of the above-quoted language in the Notice.

Based on CH&LA's latest meeting with OEHHA staff (in person with Gina Solomon and Allan Hirsch, and via phone with Mario Fernandez) on March 28, 2016, CH&LA was concerned to learn that OEHHA had an erroneous understanding regarding the evolution of the New Article since the beginning of that process in 2014. This led to the failure to include Hotel-specific provisions in the New Article, which, in turn, led to the inclusion of the above-quoted language in the Notice. <sup>iii</sup>

CH&LA believes that an understanding of the development of the New Article is essential in the adoption of Hotel-specific warning provisions. The specifics of that process are explained below.

3. **A.** The Current Article does not include Hotel-specific safe harbor warning provisions. Instead, Hotels and other persons in the course of doing businesses covered by Prop. 65 must post warning signs in the "affected area," which is currently defined in Section 12601(d) as "the area in which an exposure to a chemical known to the state to cause cancer or reproductive toxicity is at a level that requires a warning." <sup>iv</sup>

When the original Prop. 65 clear and reasonable warnings were adopted, the question of what constitutes an “affected area” in the context of different businesses created a great deal of confusion. That confusion continues. CH&LA and many other industry groups asked for clarity to delineate “affected areas” in their particular establishments. For example, in the case of Hotels, is the entire hotel the affected area? Are all guest rooms or common spaces (e.g., meeting rooms, lobbies, and pools) affected areas? Other areas?

OEHHA recognized the problems that the definition of “affected area” created, and it dealt with this issue by requiring only general “area” warnings at all *public* entrances to Hotels. Specifically, Title 27, CCR, Section 12601(d)(1)(A) states:

(d) ... (1) The method employed to transmit the warning must include the most appropriate of the following alternative methods under the circumstances:

(A) A warning that appears on a sign in the affected area. The term “sign” means a presentation of written, printed or graphic matter. The term “affected area” means the area in which an exposure to a chemical known to the state to cause cancer or reproductive toxicity is at a level that requires a warning. A posting of signs in the manner described in section 6776(e)(1) of title 3 of the California Code of Article (as amended and filed August 15, 1986) shall be sufficient for purposes of this paragraph. (Emphasis added.)

Title 3, CCR, Section 6776(e)(1) has been renumbered and is now Section 6776(d). This section states:

(d) The signs shall be posted so that they are visible at all usual points of entry to the treated area, including each road, footpath, walkway, or aisle that enters the treated field, and each border with any labor camp adjacent to the treated field. If there are no identified usual points of entry to the treated field, signs shall be posted at the corners of the treated field. When a treated field is adjacent to an unfenced public right-of-way, such as a road, trail, or path, additional signs shall be posted at each end of the treated field and at intervals not exceeding 600 feet along the treated field’s border with the right-of-way. (Emphasis added.)

Thus, posting warnings at all public entrances is currently the mechanism Hotels and other covered businesses employ to comply with the Current Article.

**B.** When OEHHA first commenced the process of developing and promulgating the New Article, one of its goals was to address the issue

raised above with respect to where and how environmental warnings should be given – both in general and in special situations (e.g., Hotels, apartments, and amusement parks). Specifically, in OEHHA's Initial Statement of Reasons contained in its "Pre-Regulatory Draft – For Discussion Purposes," dated March 7, 2014, (2014 ISOR) OEHHA stated, among other things, that:

The existing regulations were adopted more than 25 years ago shortly after Proposition 65 was passed. Much has changed during that time. The Article are in need of updating and reform to ensure that they take advantage of newer communications processes and provide useful, informative warnings for individuals who may be exposed to listed chemicals. Many stakeholders have requested modifications to the Article throughout the last several years to reduce the number of unnecessary warnings, make the warnings more informative, and reduce uncertainty for businesses who must comply with the warning requirements of the Act. (Emphasis added.)

With specific reference to Hotels, the 2014 ISOR explained that:

Unlike many other facilities, apartment complexes, hotels and other lodging facilities can present many different potential exposure scenarios. The proposed Article contains placeholder language concerning the placement of warning signs, size and font requirements and the potential contents of those warnings.

The hotel and lodging industry [i.e., CH&LA] currently provides warnings and supplemental materials such as pamphlets that could be adapted to the new format and content requirements being proposed for other scenarios in this proposed Article.

C. On March 7, 2014, OEHHA' took steps – of its own volition – to craft suggested Hotel-specific regulatory language in its "Pre-Regulatory" draft Article. Specifically, then-proposed Section 25607.17 ("Warnings for Specific Environmental Exposures") contained the following recommended Hotels-specific warning requirements:

#### **§ 25607.17 Warnings for Specific Environmental Exposures**

##### **(c) Apartments, Hotels and other Lodging Facilities – Method of Transmission**

(1) The warning message specified in subsection (d) shall be provided at each point of entry to the building on an 8 1/2-by-11 inch sign in a print font no smaller than 45-point type, placed so that it is readable and

conspicuous to individuals before they enter the premises.

(2) Hotels and other lodging facilities must also comply with the warning methods and content specified for retail sellers of consumer products, alcoholic beverages and foods where such exposures occur on the premises.

#### **(d) Apartments, Hotels and other Lodging Facilities - Content**

(1) The international health hazard symbol  .

(2) The word "**WARNING**" in all capital letters and bold print.

(3) The words "Entering these premises can expose you to varying levels of chemicals such as lead, formaldehyde and vehicle exhaust that are known to the State of California to cause cancer, birth defects or other reproductive harm. Contact building management for more information about these exposures and how to reduce or avoid them. For additional information go to [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov)."

(4) Supplemental information such as a pamphlet or other method for the consumer to obtain additional information concerning the exposure may be provided, but shall not be substituted for the warning methods described in this section. In no case shall such additional information dilute or negate the warning provided pursuant to Health and Safety Code section 25249.6.

In its March 7, 2014, Pre-Regulatory draft, OEHHA also suggested warning language pertaining to amusement parks and certain other special situations.

**D.** Subsequently, OEHHA commenced the predecessor to this current rulemaking proceeding, but – and again of its own volition – it deleted from its proposed New Article the Hotel-specific provisions quoted above. When CH&LA inquired why the March 7, 2014, proposed provisions for Hotels had been removed, OEHHA informed us, in general terms, that this deletion was undertaken to keep the New Article as uncluttered as possible!

This deletion defeated one of the key purposes of the proposed regulatory changes by, among other things, failing to provide Hotel-specific safe harbor warning language.

**4.** Subsequent to the commencement of this current rulemaking process CH&LA has submitted numerous comments strongly advising OEHHA to adopt Hotel-specific warning requirements.  OEHHA has informed CH&LA that (1) it agrees that Hotels could have their own safe-harbor warning language allowing for warnings at public entrances in the same general

manner applicable to amusement parks (2) from a procedural standpoint under the Administrative Procedures Act, it did not have sufficient time to insert Hotel-specific the proposed New Article, (3) it wishes to first finalize the New Article, (4) Hotel-specific warning language will thereafter be made part of the New Article, and (5) this regulatory amendment will be accomplished well before the two-year delayed effective date of the New Article.

CH&LA is eager to hear from OEHHA when and how to adopt Hotel-specific warnings in the New Article as soon as feasible and will be pleased to assist OEHHA to whatever extent is necessary.

Respectfully submitted,



Lynn Mohrfeld  
President & CEO  
California Hotel & Lodging Association

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<sup>i</sup> Please see the March 31, 2016 email from Malcolm Weiss. That email requested changing the definition of “Affected area” to read, “means the entire facility area in which an exposure to a listed chemical can or does occur at a level that requires a warning.” We also requested changing the definition of “Consumer product” to read, “means any article, or component part thereof, including food, that is produced, distributed, or sold by a person generally engaged in consumer product sales for the personal use, consumption or enjoyment of a consumer. We appreciate the change OEHHA made to the definition of “Consumer product exposure”.

<sup>ii</sup> Unless otherwise indicated, all regulatory section references are to Title 27, California Code of Article.

<sup>iii</sup> During CH&LA’s meeting with OEHHA staff on March 28, 2016, CH&LA was surprised to learn that OEHHA did not understand that CH&LA members were interested in an industry specific safe harbor warning provision. As this letter makes clear, OEHHA recognized the need to address the hotel industry’s concerns as early as March 2014 by proposing Hotel-specific provisions. While we were dismayed that such provisions were omitted from the proposed New Article, we are pleased that OEHHA has acknowledged that it will be taking steps to further amend the New Article to address this oversight.

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iv Hotels must also provide, of course, clear and reasonable warnings with respect to consumer products, food and non-alcoholic beverages, and alcoholic beverages.

v CH&LA recommends that OEHHA adopt the following Hotels-specific warning requirements as part of the New Article:

#### **Section 25607.XX Hotel Exposure Warnings – Method of Transmission**

(a) For hotels, a warning meets the requirements of this article if it complies with the content requirements in Section 25607.xx and is provided as follows:

(1) The warning is provided on a sign posted at the primary public entrance to the facility in no smaller than XX-point type.

(2) The warning is placed so that it is readable and conspicuous to individuals as or before they enter the hotel building.

(3) Where there is open access to the facility with no designated public entrances, the sign shall be posted at the most common area used by the public to access the facility.

(b) "Hotel" includes any type of transient lodging establishment, including but not limited to, hotels, motels, bed and breakfast inns, resorts, spas, ski resorts, guest ranches, agricultural "homestays", tourist homes, condominiums, timeshares, vacation home rentals, and extended stay establishments in which members of the public can obtain transient lodging accommodations.

(c) If other permanent entrance signage at the facility is provided in any language other than English, the warning must be provided in both English and that language.

(d) In addition to the warning specified in this section, warnings that comply with this article must also be provided for exposures to chemicals in alcoholic beverages, food, and enclosed parking facilities where such exposures occur on the premises. Other specific warnings in this Subarticle 2 are not required.

#### **Section 25607.XX Hotel Exposure Warnings – Content**

(a) A warning for hotel exposures meets the requirements of this article if it is provided using the method required in Section 25607.xx and includes all the following elements:

(1) The symbol required in Section 25603(a)(1).

(2) The word "**WARNING**" in all capital letters and bold print.

(3) The words, "[Name of one or more exposure source(s)] in this hotel can expose you to chemicals such as [name of one or more chemicals] which is [are] known to the State of California to cause cancer or birth defects or other reproductive harm." For additional information [go to www.P65Warnings.ca.gov/hotels.](http://www.P65Warnings.ca.gov/hotels)"