



June 15, 2010 (re-sent June 23, 2010)

Ms. Carol J. Monahan-Cummings  
Chief Counsel  
Office of Environmental Health Hazard Assessment  
California Environmental Protection Agency  
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Sacramento, CA 95814

By email attachment, no hard copy to follow

Dear Carol:

On behalf of the Environmental Law Foundation,<sup>1</sup> we provide these necessarily brief comments on the draft proposed regulatory amendments and accompanying statement of reasons regarding Proposition 65 food warnings.

We continue to support the agency in its efforts to find common ground on a new proposed food warning program, and to implement a warning program that will be effective and efficient for food. We agree that, in some respects, “food is different” than other consumer products. The salience of warnings and interest among some members of the public is far higher than most other retail products; at the same time, the complexity of the product lines and associated need for a uniform program that will inform consumers without confusion or unduly burdening retail outlets are both apparent.

We support the general principles set forth by the agency in the email accompanying the draft proposal, with only modest comments at this time. We will of course provide detailed comments on a line-by-line basis when the proposal is formally submitted for public comment. As the angel dwells in the details as well as the devil, we await that formal proposal and may adjust our comments accordingly. For now we supply only these broad comments:

**1. The program will be implemented on a pilot basis with a sunset date of 2014 in order for us to gauge participation and consumer response and ensure the program meets its objectives.**

A sunset date is an interesting concept, and helps to focus everyone involved not only on whether the program should be continued or discontinued but more probably on how it can be improved. However, if the sunset date is too soon and holds the possibility of repeal, it may discourage manufacturers and retailers from taking any steps to adopt a program that involve substantial up-front costs or capital outlays. A longer sunset date should be considered.

**2. The regulation will not become effective (regardless of when it is adopted) until**

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<sup>1</sup> We regret that short time for comments coincided with a number of CLEEN’s members being unavailable for a consensus response by June 15. We do note that the proposed draft adopts many of the suggestions made by CLEEN in its original comment letter in 2008 and CLEEN is pleased to have been of assistance. CLEEN remains committed to cooperating with the Task Force and the agency to craft a workable program for food warnings.

**OEHHA provides notice that the database and other necessary components are in place.**

A trigger date makes some sense for a widespread program.

**3. The option for the food retailer to use an in-store compendium of warning information has been put back in the regulation. The compendium must be used in conjunction with an in-store product identifier.**

As we have long stated, an in-store compendium can be used under Proposition 65 only if it is used in conjunction with a product identifier such as a label or shelf tag specific to the product that signal the consumer to the information in the compendium. We believe the same is true about any pamphlet or electronic system if it is not tied to a product-specific label or shelf tag. At the same time we remain convinced that few if any retailers will adopt any labor or paper intensive system.

**4. A separate compliance mechanism has been established for small food retailers with less than 1500 square feet of space devoted to food products.**

We understand the desire for this provision given the widely varying outlets for food products and will work with the agency to craft one that meets all the principles.

**5. Language has been included to clarify the requirements for food providers to identify listed chemicals in the food products on the website.**

We welcome clear and public information, and the use of the web to provide some (though not all) warning information for consumers who are hungry for more information.

**6. Language has been included to clarify that a food retailer may become responsible for providing a warning for a food product if the food retailer takes an action that creates a Proposition 65 chemical in the food product that was not present when the food was received from the food provider. This provision was unintentionally left out of the prior version of the regulation.**

This has long been understood to be an element by all parties.

**7. Warnings for mercury exposures from fresh fish are now included in the program, with certain restrictions.**

The agency may wish to include a reopener or placeholder exception for future warnings resulting from settlements of enforcement litigation. While we would strongly encourage enforcing parties to push for warnings under the regulation, it is possible that a special circumstance would call for a special type of warning. Rather than involve the agency in every food litigation, it may be wise to include pre-authorization for a warning program that comes from settlement of litigation that by definition has been reviewed by the Attorney General and approved by a court as compliant with Proposition 65.

**8. A limited opportunity to cure minor compliance issues has been included for food retailers.**

We will carefully review any “safe harbor” for noncompliance to ensure that the

exception does not swallow the rule, while accepting that minor failures in efforts to otherwise comply are a fact of human existence.

**9. A provision has been added to clarify that non-compliance with some aspect of the food warning program does not establish a per se violation of the statutory warning requirements.**

The previous comment also applies here.

One other overarching comment deserves repeating. In devising any program that is both voluntary and permits different choices for different actors in the chain of distribution, it is imperative that the program ensure there is no slip 'tween the cup and the lip such that everyone can claim compliance but no actual warning is delivered. We will carefully review the proposed program when it is issued and try to run through all possible scenarios to assist the agency to ensure that does not occur.

Obviously, a regulation that simply mandated product label warnings from the manufacturer would elide that problem (as well as many we expect industry to raise). But we also understand the agency's position desire to adopt a program that is (a) voluntary and (b) has the flexibility of choices. With that in mind we pledge to continue walking with the agency down this path and hope we can help devise a program that is both effective and efficient, and meets (and does not violate) all of Proposition 65's requirements.

Cordially,

/s/



James Wheaton

cc: CLEEN members