WPHA
Western Plant Health Association

July 5, 2018

Lauren Zeise, Ph.D., Director
Carol Monahan-Cummings, Chief Counsel
c/o Monet Vela, Rule Making Coordinator
Office of Environmental Health Hazard Assessment
1001 I Street, 23rd Floor
Sacramento, CA 95814

Submitted via https://oehha.ca.gov/comments/

Re: Proposed Amendments to Proposition 65 "Safe Harbor" Warning Regulations

Dear Dr. Zeise and Ms. Monahan-Cummings:

On behalf of the Western Plant Health Association (WPHA) I am writing in support of the Office of Environmental Health Hazard Assessment (OEHHA) proposed rulemaking announcing a proposed amendment to Article 6 of Title 27 of the California Code of Regulations, section 25603 which was published in the California Regulatory Notice Register on April 27, 2018 (Notice File Number Z-2018-0417-05). WPHA represents the interests of crop protection and fertilizer manufacturers, agricultural biotechnology providers, and agricultural retailers in California, Arizona, and Hawaii.

We appreciate the cooperative efforts of OEHHA and its willingness to consider the need for a tailored warning. WPHA believes that the following comments benefit all of our membership from registrants to applicators. The proposed amendment would provide an option for registrants to utilize in modifying the safe-harbor warning content for on-product warnings for exposures to listed chemicals in pesticide products and would allow registrants to substitute the words "Notice" or "Attention" for "Warning".

We believe that the proposed regulatory action will assist businesses, in particular pesticide registrants, to comply with Proposition 65 (Prop 65) by providing optional language for on product warnings for listed chemicals in pesticides that are also consistent with the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) and related California laws. In appropriate circumstances, this proposal may permit a registrant to provide a safe harbor warning on its product's label with the approval of the U.S. Environmental Protection Agency (US-EPA).

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Pesticides are regulated federally under FIFRA by the US-EPA. Recently, the US-EPA has disallowed amended pesticide labels offered by registrants, because in their attempts to become Prop 65 compliant, registrants have added the safe harbor language including the word "warning". To our knowledge, thus far in 2018, US-EPA has not allowed the use of an added non-FIFRA related "Warning" to pesticide labels.

For pesticides listed under Prop 65, we support the use of the words "Attention" or "Notice" instead of "Warning" to achieve proper warning and compliance with both California Prop 65 requirements and with federal precautionary language guidance documents.

We support the proposed amendments for safe harbor warnings for consumer products which would follow the example below:

> **ATTENTION:** This product can expose you to chemicals, including [name of one or more chemicals], which is [are] known to the State of California to cause cancer. For more information go to www.P65Warnings.ca.gov .

or

> **ATTENTION:** Cancer-- www.P65Warnings.ca.gov/product

Of course, the pesticide registrant would need to use the appropriate wording within the above label such as: "cause cancer"; "cause reproductive toxicity"; or known to "cause cancer and reproductive toxicity". We have recently been advised that US-EPA does not allow the use of pictograms, so we are amending our original recommendation and asking that the yellow triangle pictogram be deleted. We hope this change may help expedite the approval by US-EPA for the alternative warning language.

Justifications for this regulatory change action are: registrants of Prop 65 listed pesticides are being denied changes to their labels - if they use the word "warning" in their Prop 65 added language; within FIFRA regulations specific signal words including "warning" have purpose related to potential acute harm to workers/applicators. Additionally, in the marketplace the pesticide registrants have been advised by various large store chains that the stores will not offer the option of warnings to be on their shelves. WPHA believes tailoring the warning will allow registrants to adapt their precautionary statements to match US-EPA and OEHHA requirements.

Prop 65 requires businesses to provide a "clear and reasonable" warning before knowingly and intentionally exposing anyone, including workers, to a listed chemical at levels greater than the safe harbor level. This warning can be given by a variety of means, such as by labeling a consumer product, by posting signs at the workplace, or by posting warnings on product shelves holding the product containers.

Throughout the past year, we understand that pesticide registrants have been advised by various large store chains that the stores will not offer the option of warnings to be on their shelves, necessitating renewed consideration of on-product warnings. We have been advised by some registrants that the most direct way to inform consumers is by placing warnings on product labels. However, according to many of our member companies/registrants who are trying to

revise labels with the appropriate OEHHA warnings there is significant confusion as to what language is acceptable.

WPHA has been working with OEHHA on alternative language that is going through their rule making process. The "Attention" or "Notice" label language proposal will cover the "Clear and Reasonable" warning aspects of product warnings.

WPHA would like to reaffirm that: *"A business may still choose **not** to take advantage of the safe harbor provisions and provide an otherwise "clear and reasonable" warning that complies with the Act."*

There is concern that FIFRA preemption would automatically prohibit OEHHA from imposing any requirement for packaging or labeling different from requirements imposed under FIFRA. However, the US-EPA already clearly provides training and guidance to their registration review staff that distinctly accommodates California Prop 65. (see attachment – EPA Label Review Manual, Chapter 7: Precautionary Statements, page 7-3, Item **4. Related Information** – *"California's Proposition 65 may require the term "warning" be used on a label. However, registrants should use the term "notice" or "attention" instead, so that it does not conflict with the EPA required Signal Word."*).

We believe the proposal provides regulatory relief, because the amendments allow optional safe harbor warning content for Proposition 65 warnings on pesticide product labels that are also consistent with FIFRA and related California laws, and provides guidance to growers, applicators, and distributors of these products on additional warning requirements pertaining to Prop 65.

Suggested changes to existing proposed language:

- We believe that the alternative warning words of "Attention" or "Notice" should be allowed regardless of FIFRA category (Danger, Warning, or Caution). The Prop 65 warning should be separate from, and not to be confused with any FIFRA label wording. This use of the suggested alternative signal words is a very narrow fix specifically targeted at the controversial signal wording of Prop 65 wording versus FIFRA specific requirements, and without any confusion or overlap.

- Pictogram: The yellow triangular pictogram is not consistent for FIFRA regulated product labeling and should be deleted from being a requirement for packaged goods. Conversely, the pictogram can be used by our retailer and applicator member companies as they transition to comply with the new Prop 65 warning requirements within their facility/site locations for occupational and environmental warnings and training programs.

- Request for six-month delay in implementing any new Prop 65 warning requirements for consumer-packaged goods that are regulated under FIFRA: WPHA has been working in earnest with US-EPA, DPR and OEHHA to try to complete this warning alternative in time for the August 30, 2018 implementation date. However ultimately, the proposed

alternative precautionary language change depends upon US-EPA approving pesticide label language that includes the appropriate Prop 65 alternative precautionary wording. Due to delays at the federal level the proposed solution for alternative warnings to achieve a safe harbor warning is unresolved. As the alternative warning language is out of the registrant's control, we ask that OEHHA grant a six-month delay in rule implementation from the date of US-EPA's decision to approve or disapprove the alternative label warning language. This transition period will afford the time needed for US-EPA to provide clarification to registrants as to what may be allowed in the way of an alternative warning notice to accommodate Prop 65, and to hopefully process amended labels submitted by registrants.

WPHA will continue to work with our member companies to meet the other aspects of the new regulations including occupational and environmental warnings. We value the opportunity to have worked with you over the past several months to progress this rule making change to the existing regulations. WPHA agrees the best-case scenario would be of a single streamline label without the need for arbitration between agencies. However, in lieu of that future ideal, we believe this proposal achieves a reasonable fix to the predicament faced by our member companies, who wish to provide safe harbor warning on their label under Prop 65 but need to obtain US-EPA approval for their labels. We thank you for your consideration of our comments. If you have any questions, please feel free to contact me at Davel@healthyplants.org.

Sincerely,

Dave Lawson
Director of Environmental and Regulatory Affairs

cc: Mario Fernandez, OEHHA
Marylou Carlos-Verde, CDPR
Renee Pinel, WPHA