

ECOLOGY LAW CENTER

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MAY 1, 2019

NOTICE OF VIOLATIONS

CALIFORNIA SAFE DRINKING

WATER AND TOXIC

ENFORCEMENT ACT

TO THE NOTICED PARTIES LISTED IN **EXHIBIT A** AND THE PUBLIC PROSECUTORS LISTED ON THE **DISTRIBUTION LIST** ACCOMPANYING THE ATTACHED CERTIFICATE OF SERVICE

Re: Violations of Proposition 65 Concerning Carbon Monoxide Exposures from Wood Burning Fire Pits

In accord with California Health & Safety Code § 25249.7, Ecological Rights Foundation (“ERF”) hereby gives you notice that your company has violated and is in ongoing violation of California Health & Safety Code § 25249.6, which provides that “[n]o person in the course of doing business shall knowingly and intentionally expose any individual to a chemical known to the state to cause cancer or reproductive toxicity without first providing a clear and reasonable warning to such individual.”

Pursuant to California Health & Safety Code § 25249.7, ERF intends to bring an enforcement action 60 days after effective service of this notice unless the public enforcement agencies have commenced and are diligently prosecuting an action to rectify the violations discussed in this notice letter. The public enforcement agencies that have been served with copies of this notice of violations are identified on the attached Certificate of Service.

This Notice of Violations (“Notice”) is provided to you pursuant to and in compliance with California Health and Safety Code § 25249.7(d). Attached for your reference is a summary, “Appendix A: The Safe Drinking Water and Toxic Enforcement Act of 1986 (Proposition 65): A Summary” prepared by the California Office of Environmental Health Hazard Assessment (“OEHHA”). Pursuant to Title 11, C.C.R. § 3100, a Certificate of Merit is also attached.

The above-referenced violations occur when California residents use wood burning fire pits. These products are used primarily for heating, ambiance, and cooking. Combustion of wood in fire pits produces and exposes people to **carbon monoxide**, a chemical known to the State of California to cause reproductive toxicity. Because the combustion of wood causes carbon monoxide to be released into the air, people using wood burning fire pits, and others standing near the products when wood fuel is burning, inhale carbon monoxide. Exposure to carbon monoxide is via the inhalation route. These products cause carbon monoxide exposures to occur in people’s yards and everywhere else throughout California where these products are used. These violations are alleged for consumer and environmental exposures.

Exhibit A includes examples of your products subject to this notice. Though specific models or SKU or product numbers are given as examples, this Notice also pertains to all models, and all variations, of wood burning fire pits sold in California. Exhibit A is for the recipient’s benefit and is not meant to be an exhaustive or comprehensive identification of each specific offending product. It is ERF’s position that you are obligated to conduct a good faith investigation into other specific products within the identified category or type that may have been manufactured, distributed, sold, shipped, stored

(or otherwise within the notice recipient's custody or control) during the past three years, to ensure that clear and reasonable warnings are provided to California citizens prior to purchase, or retroactively if necessary.

You have not and do not provide people with clear and reasonable warnings before exposing them in California to carbon monoxide. The above-referenced violations have occurred every day since at least May 1, 2016 and will continue every day until clear and reasonable warnings are given.

ERF is a California non-profit corporation dedicated to protecting human and environmental health, including raising awareness of, and reducing exposures to, toxic chemicals. The following individual is the responsible individual within ERF for purposes of this Notice:

James Lamport, Executive Director
Ecological Rights Foundation
867 B Redwood Drive
Garberville, California 95542
Telephone: (707) 923-4372


ERF has retained the following counsel to represent them in this matter (please direct communications to counsel):

Fredric Evenson
Ecology Law Center
P.O. Box 1000
Santa Cruz, California 95061
Telephone: (831) 454-8216
Email: evenson@ecologylaw.com

Resolution of Noticed Claims:

ERF is interested in seeking a constructive resolution of this matter that advances the public interest without engaging in costly and protracted litigation. ERF is willing to settle this matter to the extent legally possible prior to the commencement of any enforcement action. Settlement terms would require that the unwarned exposures described in this Notice of Violation be stopped. That would require at least the following: 1) a potential recall of products already sold; 2) that either warnings be given to all future purchasers in California of the products subject to this Notice, that the products be reformulated to eliminate the exposures described in the Notice, or that you stop marketing, distributing or selling the products in California; 3) that you locate and provide a warning compliant with Title 27, C.C.R. § 25601 to each person who has been subject to the unwarned exposures described in the Notice to the extent those exposures are caused by products that were sold in California during the past three years; and 4) that you pay an appropriate civil penalty based on the factors enumerated in California Health and Safety Code § 25249.7(b). It should be noted that ERF cannot finalize any settlement of this matter until 70 days have elapsed since the sending of the Notice and unless no public enforcer has begun an enforcement action concerning the violations described in the Notice. Any settlement on behalf of the public interest must be approved by the California Superior Court on noticed motion with 45 days' notice to the California Attorney General. The Attorney General may appear at any approval hearing and oppose a settlement if he or she believes the proposed settlement is not in the public interest. If you wish to discuss settlement of this matter before ERF files suit, please promptly contact ERF's counsel.

Sincerely,



Fredric Evenson

CERTIFICATE OF SERVICE

I am over the age of 18. My business address is 2340 Dayton Street, Aurora, CO 80010.

On May 7, 2019, I served the following:

- 1) Notice of Violations: California Safe Drinking Water and Toxic Enforcement Act
- 2) Certificate of Merit: Health and Safety Code Section 25249.7(d)
- 3) Appendix A: The Safe Drinking Water and Toxic Enforcement Act of 1986 (Proposition 65): A Summary
- 4) Certificate of Service

By enclosing copies of the same in a sealed envelope addressed to each party on the attached Exhibit A: May 1, 2019 Notice of Violations Carbon Monoxide Exposures from Wood Burning Fire Pits and depositing the envelope in the U.S. mail with postage fully prepaid for delivery by Certified Mail. Place of mailing: Aurora, CO.

On May 7, 2019, I also served the following:

- 1) Notice of Violations: California Safe Drinking Water and Toxic Enforcement Act
- 2) Certificate of Merit: Health and Safety Code Section 25249.7(d)
- 3) Certificate of Merit: Compliance with California Code of Regulations Section 3102 (only sent to Attorney General)
- 4) Certificate of Service

By enclosing copies of the same in sealed envelopes addressed to each of the public enforcement agencies listed on the attached Service List of Public Enforcers, and depositing the envelope in the U.S. mail with postage fully prepaid for delivery by First Class Mail. Place of mailing: Aurora, CO. I also served the foregoing, by sending portable document format (.pdf) files of the same, to the electronic mail addresses to each of the public prosecutors identified by the California Attorney General as having authorized electronic service of notices. These public enforcement agencies appear on the attached Service List with their electronic mail addresses.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed May 7, 2019 in Aurora, CO.



Stuart Wilcox

Service List

Office of the District Attorney Alameda County CEPDProp65@acgov.org	Office of the District Attorney Lassen County mlatimer@co.lassen.ca.us	Office of the District Attorney San Benito County 419 4th Street Hollister, CA 95023	Office of the District Attorney Tehama County P.O. Box 519 Red Bluff, CA 96080
Office of the District Attorney Alpine County P.O. Box 248 Markleeville, CA 96120	Office of the District Attorney Los Angeles County 211 W. Temple Street, Suite 1200 Los Angeles, CA 90012	Office of the District Attorney San Bernardino County 303 W. Third Street San Bernardino, CA 92415	Office of the District Attorney Trinity County P.O. Box 310 Weaverville, CA 96093
Office of the District Attorney Amador County 708 Court Street, #202 Jackson, CA 95642	Office of the District Attorney Madera County 209 West Yosemite Avenue Madera, CA 93637	Office of the District Attorney San Diego County CityAttyProp65@sandiego.gov	Office of the District Attorney Tulare County Prop65@co.tulare.ca.us
Office of the District Attorney Butte County 25 County Center Drive Oroville, CA 95965	Office of the District Attorney Marin County 3501 Civic Center Drive, Room 130 San Rafael, CA 94903	Office of the District Attorney San Francisco County gregory.alker@sfgov.org	Office of the District Attorney Tuolumne County 423 N. Washington Street Sonora, CA 95370
Office of the District Attorney Calaveras County Prop65Env@co.calaveras.ca.us	Office of the District Attorney Mariposa County P.O. Box 730 Mariposa, CA 95338	Office of the District Attorney San Joaquin County DAConsumer.Environmental@sjcda.org	Office of the District Attorney Ventura County daspecialops@ventura.org
Office of the District Attorney Colusa County 346 5th Street, Suite 101 Colusa, CA 95932	Office of the District Attorney Mendocino County P.O. Box 1000 Ukiah, CA 95482	Office of the District Attorney San Luis Obispo County edobroth@co.slo.ca.us	Office of the District Attorney Yolo County cfepd@yolocounty.org
Office of the District Attorney Contra Costa County sgrassini@contracostada.org	Office of the District Attorney Merced County 550 West Main Street Merced, CA 95340	Office of the District Attorney San Mateo County 400 County Center, Third Floor Redwood City, CA 94063	Office of the District Attorney Yuba County 215 Fifth Street, Suite 152 Marysville, CA 95901
Office of the District Attorney Del Norte County 450 H Street, Room 171 Crescent City, CA 95531	Office of the District Attorney Modoc County 204 S. Court Street Room 202 Alturas, CA 96101	Office of the District Attorney Santa Barbara County DAProp65@co.santa-barbara.ca.us	Oakland City Attorney City Hall, 6th Floor 1 Frank Ogawa Plaza Oakland, California 94612
Office of the District Attorney El Dorado County 515 Main Street Placerville, CA 95667	Office of the District Attorney Mono County P.O. Box 617 Bridgeport, CA 93517	Office of the District Attorney Santa Clara County EPU@da.sccgov.org	Office of the City Attorney City of San Francisco City Hall, Room 234 1 Dr. Carlton B. Goodlett Pl. San Francisco, CA 94102
Office of the District Attorney Fresno County 2220 Tulare Street, Suite 1000 Fresno, CA 93721	Office of the District Attorney Monterey County Prop65DA@co.monterey.ca.us	Office of the District Attorney Santa Cruz County Prop65DA@santacruzcounty.us	Office of the City Attorney City of Sacramento 915 I Street, 4th Floor Sacramento, CA 95814
Office of the District Attorney Glenn County P.O. Box 430 Willows, CA 95988	Office of the District Attorney Napa County CEPD@countyofnapa.org	Office of the District Attorney Shasta County 1355 West Street Redding, CA 96001	Office of the City Attorney City of San Jose 200 E. Santa Clara St. San Jose, CA 95113
Office of the District Attorney Humboldt County 825 5th Street, 4 th Floor Eureka, CA 95501	Office of the District Attorney Nevada County 201 Commercial Street Nevada City, CA 95959	Office of the District Attorney Sierra County P.O. Box 457 Downieville, CA 95936	Office of the City Attorney City of Los Angeles 200 N. Main Street, Suite 800 Los Angeles, CA 90012
Office of the District Attorney Imperial County 940 West Main Street, Suite 102 El Centro, CA 92243	Office of the District Attorney Orange County 401 Civic Center Drive West Santa Ana, CA 92701	Office of the District Attorney Siskiyou County P.O. Box 986 Yreka, CA 96097	Office of the City Attorney City of San Diego 1200 Third Ave., Suite 1620 San Diego, CA 92101
Office of the District Attorney Inyo County inyoda@inyocounty.us	Office of the District Attorney Placer County 10810 Justice Center Drive Roseville, CA 95678	Office of the District Attorney Solano County 675 Texas Street, Suite 4500 Fairfield, CA 94533	Proposition 65 Enforcement Reporting Attn: Prop 65 Coordinator 1515 Clay Street P.O. Box 70550 Oakland, CA 94612
Office of the District Attorney Kern County 1215 Truxtun Avenue Bakersfield, CA 93301	Office of the District Attorney Plumas County 520 Main Street, Room 404 Quincy, CA 95971	Office of the District Attorney Sonoma County jbarnes@sonoma-county.org	
Office of the District Attorney Kings County 1400 West Lacey Blvd. Hanford, CA 93230	Office of the District Attorney Riverside County Prop65@rivcoda.org	Office of the District Attorney Stanislaus County 832 12th Street, Suite 300 Modesto, CA 95354	
Office of the District Attorney Lake County 255 N. Forbes Street Lakeport, CA 95453	Office of the District Attorney Sacramento County Prop65@sacda.org	Office of the District Attorney Sutter County 446 Second Street, Suite 102 Yuba City, CA 95991	

Exhibit A
May 1, 2019 Notice of Violations
Carbon Monoxide Exposures from Wood Burning Fire Pits

Names and Addresses of Responsible Parties	Non-Exclusive Examples of the Products*	Item#, UPC or SKU # or Further Description
Costco Wholesale Corporation President or CEO c/o John Sullivan 999 Lake Drive Issaquah, WA 98027-8990	Hello Outdoors Outdoor Cooking Pit	- Item# 1900726 - Model# 2090
P&D Metal Works, Inc. President or CEO c/o Diane Pruchnofski 2475 Schultz Drive Neenah, WI 54956 Lowe's Companies, Inc. President or CEO c/o Corporation Service Company 2626 Glenwood Avenue, Suite 550 Raleigh, NC 27608	- P&D Metal Works 38- in W Mild Steel Wood-Burning Fire Pit	- Item# 844524 - Model# NW00738
Sam's West, Inc. President or CEO c/o CT Corporation System 124 West Capitol Avenue Little Rock, AR 72201	- Hello Outdoors Outdoor Fire Pit - Northwest Sourcing Outdoor Fire Pit	- Item# 636565459 - Supplier Stock# CWGS15-101 - PO# 4354397230 - Item# 656545

* These non-exclusive examples of the category or type of product that is subject to this Notice is for the recipient's benefit in its investigation of ERF's allegations. These examples are not meant to be an exhaustive or comprehensive identification of each specific offending product of the category or type of products subject to this notice. It is ERF's position that the alleged Violators are obligated to conduct a good faith investigation into other specific products within the identified category or type that may have been manufactured, distributed, sold, shipped, stored (or otherwise within the notice recipient's custody or control) during the past three years, to ensure that clear and reasonable warnings are provided to California citizens prior to purchase, or retroactively if necessary.



Certificate of Merit
Health & Safety Code Section 25249.7(d)

I, Fredric Evenson, hereby declare:

(1) This Certificate of Merit accompanies the attached sixty-day notice(s) in which it is alleged the parties identified in the notices have violated Health and Safety Code section 25249.6 by failing to provide clear and reasonable warnings.

(2) I am the attorney for the noticing party.

(3) I have consulted with one or more persons with relevant and appropriate experience or expertise who has reviewed facts, studies, or other data regarding the alleged exposure to the listed chemical that is the subject of the action.

(4) Based on the information obtained through those consultations, and on all other information in my possession, I believe there is a reasonable and meritorious case for the private action. I understand that "reasonable and meritorious case for the private action" means that the information provides a credible basis that all elements of the plaintiff's case can be established and the information did not prove that the alleged violator will be able to establish any of the affirmative defenses set forth in the statute.

(5) The copy of this Certificate of Merit served on the Attorney General attaches to it factual information sufficient to establish the basis for this certificate, including the information identified in Health and Safety Code section 25249.7(h)(2), *i.e.*, (1) the identity of the persons consulted with and relied on by the certifier, and (2) the facts, studies, or other data reviewed by those persons.

Date: May 1, 2019

By:



Fredric Evenson

