



HSIA

halogenated
solvents
industry
alliance, inc.

April 8, 2015

Monet Vela
Office of Environmental Health Hazard Assessment
P. O. Box 4010
Sacramento, California 95812-4010

Re: Clear and Reasonable Warning Regulations

Dear Sir or Madam,

I write on behalf of the Halogenated Solvents Industry Alliance, Inc. (HSIA) to provide these comments on a changed approach to safe harbor warnings under Proposition 65 proposed by the California EPA Office of Environmental Health Hazard Assessment (OEHHA) on January 12, 2015. According to the notice, OEHHA intends to “establish a new, mandatory regulation addressing the relative responsibility of product manufacturers and others in the chain of distribution, versus the product retailer. It also contains the definitions relevant to Article 6 [Proposition 65]. The regulations in proposed Subarticle 2 provide specific guidance on methods and content for safe harbor warnings that will provide more detailed information for the public, including a clear statement that a person ‘can be exposed’ to a listed chemical, the names of certain chemicals and a link to a website maintained by OEHHA containing supplemental information. These new regulations would further the ‘right-to-know’ purposes of the statute and provide more specificity for the content of safe harbor warnings for a variety of exposure situations, and corresponding methods for providing those warnings. Businesses would continue to be assured that compliance with the regulations will help them avoid litigation because the content and methods provided in the regulation are deemed ‘clear and reasonable’ for purposes of complying with the Act.”

HSIA supports the comments being submitted by the California Chamber of Commerce and allied organizations. HSIA agrees that the notion that the proposed regulations would somehow benefit the business community is laughable. Contrary to its stated intent, the proposal will make Proposition 65 compliance more difficult for businesses of all sizes, will create many new avenues for increased litigation, and will have a significant economic impact on California businesses. We offer these comments on two sections in particular.

Proposed § 25602

Proposed § 25602 lists twelve chemicals that must be specifically identified in a safe harbor Proposition 65 warning. HSIA’s member companies manufacture methylene chloride, one of the listed chemicals. We question OEHHA’s statutory authority to elevate certain listed chemicals over others in this kind of “super-listing,” and urge OEHHA to eliminate this provision altogether.

First, proposed § 25602 does not establish any criteria for listing the twelve chemicals, or even explain why it chose to list twelve, as opposed to three, or 36, or 112. Rather, OEHHA identifies criteria it considered when creating the list, criteria that may well change over time without any prior notification, because nothing in the proposed regulation would bind OEHHA to any set criteria. For this reason alone, this regulation can be challenged on Constitutional due process grounds as void for vagueness. Moreover, there is no sound basis for the “criteria” that OEHHA does describe. For example, OEHHA cites “recognizability of the chemical name among the general public” as one criterion (p. 14), but does not explain how any such “recognizability” justifies special listing. Similarly, OEHHA provides no explanation of the relevance of “recent Proposition 65 enforcement activity” as a criterion. Enforcement activity is largely driven by a few individuals and their lawyers, a fact that should have no bearing in deciding how to regulate warnings. In sum, there is no evidence in the record to support either the listing approach or the arbitrary selection of a dozen substances to list.

Second, the identification of a compound as requiring special individual warnings under Proposition 65 will have a significant adverse economic impact on the manufacturers of those compounds. Potential customers will deselect those compounds in order to avoid the more burdensome Proposition 65 warning requirements for them. The purpose of Proposition 65 was to ensure clear and reasonable warnings, not to deselect products. OEHHA is not authorized under Proposition 65 to undertake risk assessments for this purpose.

Third, higher costs will result due to the need to increase space in a warning in order to accommodate the additional chemical identification. Such increased space comes at a cost, whether on product labels, signage, or by other methods.

Finally, and most importantly, the proposed warning language may be inconsistent with language already required under federal law. In the case of household products containing methylene chloride, containers already carry labeling which must state “Contains methylene chloride, which has been shown to cause cancer in certain laboratory animals.” For listed chemicals, however, proposed § 25602 would provide the content of the required product-specific warnings. These include (i) a symbol consisting of a black exclamation point in a yellow equilateral triangle with a bold black outline, and (ii) specific language identifying the listed chemical in the product, the Proposition 65 warning for that chemical, and a reference to the website to be established by OEHHA. In the case of on-product warning labels, proposed § 25602 would require (i) the symbol described above, and (ii) WARNING, in at least 10-point type, and for carcinogens the words “Cancer - www.P65Warnings.ca.gov/product,” in no smaller than 8-point type.

The federal labeling for household products containing methylene chloride was approved by the Consumer Product Safety Commission (CPSC) in a Statement of Interpretation and Enforcement Policy, 52 Fed. Reg. 34698 (September 14, 1987), adopted under the Federal Hazardous Substances Act (FHSA). CPSC regulations implementing the FHSA include very specific requirements on presentation:

(d) *Conspicuousness—contrast.* To satisfy the requirement that cautionary labeling statements appear in conspicuous and legible type which is in contrast by typography, layout, or color with the other printed matter on the label, such statements shall conform to the following requirements:

(1) *Color.* Where color is the primary method used to achieve appropriate contrast, the color of any cautionary labeling statement shall be in sharp contrast with the color of the background upon which such a statement appears. Examples of combinations of colors which may not satisfy the requirement for sharp contrast are: black letters on a dark blue or dark green background, dark red letters on a light red background, light red letters on a reflective silver background, and white letters on a light gray or tan background.

(2) *Interference with conspicuousness—labeling design, vignettes, or other printed material.* For cautionary information appearing on panels other than the principal display panel, the label design, the use of vignettes, or the proximity of other labeling or lettering shall not be such that any cautionary labeling statement is obscured or rendered inconspicuous.

16 CFR § 1500.121(d). It would appear that the specificity of the proposed warning for products containing methylene chloride in California might interfere with the conspicuousness federal labeling required under the FHSA.

Moreover, Section 18(b)(1)(A) of the FHSA provides that the cautionary language required under the FHSA is preemptive of any non-identical state requirements, such as those in proposed § 25602:

“Except as provided in paragraphs (2) and (3) (15 U.S.C. 1261n), if a hazardous substance or its packaging is subject to a cautionary labeling requirement under section 2(p) or 3(b) designed to protect against a risk of illness or injury associated with the substance, no State or political subdivision of a State may establish or continue in effect a cautionary labeling requirement applicable to such substance or packaging and designed to protect against the same risk of illness or injury unless such cautionary labeling requirement is identical to the labeling requirement under section 2(p) or 3(b).”

“Under the Commission’s interpretation, products that contain methylene chloride and that expose consumers to significant amounts of methylene chloride vapor are hazardous substances subject to the requirements of section 2(p)(1) of the FHSA. Therefore, under the terms of section 18(b)(1)(A) of the FHSA, the Commission concludes that any statutes or regulations of state or local governments establishing cautionary labeling requirements designed to protect against the risk are void and unenforceable to the extent that the state or local requirements are not identical to the requirements under section 2(p)(1) of the FHSA.” 52 Fed. Reg. 34698, 34702.

For all these reasons, HSIA submits that the approach of proposed § 25602 -- specifically identifying safe harbor Proposition 65 warning for listed chemicals -- should be revisited.

Proposed § 25205

Section 25205 is a standalone but related proposal that OEHHA will develop and maintain a website to provide information to the public to supplement and explain the basis for the Proposition 65 warnings provided by businesses. In addition to allowing OEHHA to compile its own information on the website for public consumption, proposed § 25205(b) would empower OEHHA to *require* manufacturers, importers and distributors of products bearing a Proposition 65 warning to provide the agency the following information:

- “(1) The name and contact information for the person providing the information.
- (2) The name and contact information for the manufacturer of the product.
- (3) The name of the listed chemical or chemicals for which a warning is being provided.
- (4) For environmental warnings, the location of the chemical or chemicals in the area.
- (5) For product warnings, the location of the chemical or chemicals in the product.
- (6) For product warnings, the concentration (mean, minimum, maximum) of the chemical or chemicals in the final product. If the product contains multiple component parts, the business must provide the concentrations (mean, minimum, maximum) of the chemical or chemicals in each of the component parts.
- (7) For product warnings, the matrix, as defined in subsection 25900(g) of this chapter, in which the listed chemical or chemicals is found in the product and the concentration of the listed chemical(s) in the product matrix, if known.
- (8) The anticipated routes and pathways of exposure to the listed chemical(s) for which the warning is being provided.
- (9) The estimated level of exposure to the chemical or chemicals.
- (10) Any other related information that the lead agency deems necessary.”

Proposition 65 does not empower OEHHA to require manufacturers, importers and distributors to provide it with any supplemental information. Specifically, Proposition 65 requires a person in the course of doing business to provide a “clear and reasonable” warning before knowingly and intentionally exposing individuals to Proposition 65-listed chemicals. No provision in Proposition 65, however, provides OEHHA with authority to require that businesses provide it supplemental information of any sort beyond that which is already provided

in a warning. Perhaps recognizing this restriction, proposed § 25600(d) expressly *permits*, but does not *require*, businesses to provide consumers with supplemental information in their warnings. That should be sufficient.

Moreover, OEHHA's Initial Statement of Reasons states (p. 3) that, in demanding this information from businesses, OEHHA intends to "collect existing, publicly available information and make it accessible to those who may have questions when they see a Proposition 65 warning." Not only is information on, for example, the estimated level of exposure to a chemical in a household product not readily available, there are as many exposure scenarios as there are uses of the product, making the collection and posting of such data an exercise in futility. It is also possible that erroneous exposure scenarios might be collected and posted. Would OEHHA bear the responsibility in such case to police the website to avoid the publication of misleading information?

Finally, it should be noted that OEHHA collecting concentrations and locations of chemicals has the potential to put trade secrets at risk (concentrations) and to create security risks (locations), to the extent such information is made available to the public.

Conclusion

OEHHA should reconsider the proposed rule and Initial Statement of Reasons and provide a serious economic impact analysis. It should then propose changes that would simplify the clear and reasonable warning requirements and provide for public comment a proposal to achieve meaningful safe harbors.

Very truly yours,

Faye Graul /wcn

Faye Graul
Executive Director