

BEFORE THE
OFFICE OF ENVIRONMENTAL HEALTH HAZARD ASSESSMENT (OEHHA)
CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY

COMMENTS

on

PROPOSITION 65 draft WARNING REGULATIONS
dated January 16, 2015

amending/replacing

27 CCR Article 6
subarticle 1 (General)
and
subarticle 2 (Safe Harbor Methods and Content)

Submitted April 8, 2015

These comments incorporate by reference the oral comments made by David Roe at the March 25, 2015 public hearing on these draft regulations.

GENERAL COMMENTS

- A. This draft is a major improvement over previous drafts of proposed Proposition 65 warning regulations, going back some two years. With exceptions as noted in specific comments below, and with improved drafting to avoid loopholes and anomalies (see General Comment C), these regulations would substantially reduce uncertainty, improve compliance, improve public knowledge, and reduce the number of actual Proposition 65 warnings, all of which would further the purposes of the law as enacted by the voters.
- B. The purpose of clarifying and improving Prop. 65 warnings is two-fold: to increase public awareness and understanding of the warnings that the law does require; and to increase the incentive for potential defendants to eliminate and/or reduce the exposures to listed chemicals for which they are responsible, thus eliminating or reducing their legal obligations to warn. In other words, clearer warnings mean fewer warnings, and the public benefits from both.
- Prop. 65 warnings are meant to be like traffic signs, instantly and unmistakably recognized at a glance by the average individual. **Simplicity, clarity, and directness** are therefore the paramount considerations for safe-harbor warnings: the simpler and clearer the warning is to its intended recipients, the stronger the incentive is to avoid having to give it. Wordiness and complexity are the enemy of Prop. 65's purpose in requiring warnings.
- C. Precise drafting of safe-harbor regulations is especially important. Since these regulations provide legal safety, any loopholes or ambiguities are virtually certain to be exploited, and to be litigated vigorously in any enforcement cases in which compliance with safe-harbor rules is disputed. Specific comments below will highlight important examples, but there are numerous others.
- D. Making it a safe harbor necessity to include reference to online materials tends to undermine the traffic-sign clarity that should be paramount (see comment B above). These comments urge OEHHA to make all such references optional instead. However, for any reference to online information that remains, OEHHA should shorten the web address as much as possible (e.g., "warn.ca.gov" or "chemical.ca.gov") by securing the necessary alias(es) and requiring their use.

SPECIFIC COMMENTS

1. §25600(d) – anti-dilution provision

This provision against undermining the effectiveness of a warning is an important part of any safe-harbor regulation, since experience shows that safe harbors will be creatively stretched as far as lawyers think they can justify. Because the terminology in such a provision cannot be entirely precise (e.g., “dilution”), it is critical to include language that discourages creative stretching; e.g., by providing that additional information may not “tend to” dilute, or to “reduce the significance of,” the warning message. In other words, this provision should put the risk of stretching ambiguous terminology onto the party providing the warning, not onto the enforcer. This is entirely appropriate for a safe-harbor mechanism, which is a privilege extended to warning parties for their convenience rather than any legal right, and doing so will reduce legal gamesmanship.

It is also important to address two different dilution risks, first having to do with obscuring or undermining the content of a safe-harbor warning (e.g., “don’t take this seriously”); and second, by a manner of presentation that distracts or diverts attention (e.g., placement next to a much larger sign in flashing neon that says “wonderful news!”; or at the end of several other paragraphs of information). Separately addressing these two different types of dilution risk is consistent with the structure of the regulations throughout, which repeatedly distinguish between content and manner.

Finally, it is important to state explicitly that any warning that does not satisfy the requirements of this anti-dilution provision is automatically disqualified from safe-harbor status (although of course still eligible for a court determination of “clear and reasonable”).

Suggested language:

(d) A person providing a warning required by Section 25249.6 of the Act may provide additional information to the exposed individual that is supplemental to the warning, such as further information about the form or nature of the exposure and ways to avoid exposure, but may not provide additional information that in its content tends to contradict, dilute, or otherwise reduce the significance of the content of the warning, or that tends to distract from or diminish the recognition or understanding of the warning by the manner in which the additional information is provided. A warning that does not comply with the requirements of this subparagraph does not satisfy the requirements of §25601(a).

2. §25600.1(a) – “affected area” definition and “reasonably calculated”

Using the term “reasonably calculated” to define the area for an environmental exposure opens a door to serious abuse, because it suggests that any party’s “calculation” will suffice for safe-harbor purposes, no matter how distorted or manipulated.

The term “reasonably” offers no actual protection against the described abuse, because hiring a supposed expert to do the calculation would almost certainly be enough to satisfy it, no matter how unreasonable the calculation itself might be. What OEHHA appears to mean – which is that the calculation itself must be reasonable – can easily be accomplished (see below).

As many Proposition 65 enforcement actions have demonstrated, expert witnesses can readily be found to testify to even absurdly distorted “calculations.” (In the first Proposition 65 case to go to jury trial, for exposures to methylene chloride that were at a level 39,000 times higher than OEHHA’s safe harbor level, the defense expert testified under oath to his calculation that the actual cancer risk of methylene chloride was 40,000 times lower than what OEHHA had determined.)

At trial, the validity of such calculations is subject to test, with the burden of proof on the defendant. But no such constraint would exist for an expert calculating a tiny or non-existent affected area for purposes of safe-harbor environmental warnings, using extreme or fallacious assumptions. The client would claim that it believed the calculation was “reasonable” because it was done by an “expert,” and there would be no way to test the calculation itself. This, to say the least, would be an open invitation to highly tendentious “calculations.”

Assuming that OEHHA wants the calculation itself to be reasonable, it should follow the statutory design and provide that an affected area is the one in which the party responsible for the exposure knows it is occurring, and has not determined that exposure levels are low enough to be exempt. In other words, the responsible party’s knowledge creates the area to begin with, and then the responsible party’s homework on levels of exposure within that area can shrink that area to be as small as the Act’s exemptions allow – with the burden to do that homework remaining where the Act places it.

This redrafting would also eliminate any implication that failure to do the homework (i.e., failure to “calculate”) would somehow create an “affected area” of zero and/or eliminate the obligation to warn.

NOTE: The same potential trap in the term “reasonably calculated” also occurs in §25602(a), §25608.18, §25608.19, §25608.20, and §25608.26; and it should be corrected in each of those provisions. In all cases, the trap can be avoided by eliminating the term “reasonably calculated” and instead using a cross-reference to the definition for “affected area” (once that definition is clarified as described above).

3. §25600.1(h) *et seq.* – “product exposure” definition

The draft terminology for exposures to “products” is ambiguous and open to highly overbroad interpretations, since many things could be considered “products” that are not consumer products within ordinary understanding. This is not an issue with current regulatory language and is presumably inadvertent in this draft.

This comment assumes that OEHHA’s intent is to cover exposures only (a) to consumers (and potential consumers) of products that (b) are intended for consumption (so-called “final goods” in economic terminology, as opposed to “intermediate goods” which can be used to produce other goods), and (c) only in the course of anticipated consumption of those goods (including purchase, storage, etc.). In other words, this type of exposure is NOT intended to cover exposure to warehouse workers moving consumer products around before the items are sold to consumers; NOT intended to cover exposures to products being made into other products before sale to the consumer (such as fabric and thread being sewn into clothing); and NOT intended to cover post-sale exposures to consumer goods that are not related to anticipated consumer uses (such as exposure to smoke from burning the discarded packaging of a children’s toy).

Clarifying these limits will eliminate most of the problems with the current overbroad definition. Specifically, the exposure term should be changed to “**consumer product exposure**”; its definition should use the well-understood economic term “**consumer good**”; and the exposures in question should be limited to exposures to the reasonably anticipated consumer or potential consumer (including children who would not be purchasers or direct consumers but might be exposed to a household cleaning product in the household of the consumer). Existing language elsewhere in the draft regulations provides, appropriately, that exposures other than those covered by this more focused definition are either environmental or workplace exposures for purposes of safe-harbor warnings.

Also, to avoid any ambiguity, the term “product” or “consumer product” should be changed to “consumer good” (or to “item,” where context is clear) throughout the entire safe-harbor regulation, and the words “product” and “consumer product” should never occur except within the officially defined three-word term “consumer product exposure” (e.g., in the caption to §25600.2, the next section).

4. §25600.2(d) and (3) – chain of responsibility for retailers

Efforts to draft a chain of responsibility for consumer product exposures, going as high in the chain toward the manufacturer as possible, date back to 1987. Two key concerns have to be kept in mind. *First*, the chain must not allow legal responsibility to be dumped on “cut-outs” or deliberately weak or judgment-proof entities. If it does, these will rapidly be identified or invented for the purpose. *Second*, economic power as

between retailers and others in the chain is highly variable. A design that assumes powerful retailers (ones like a Wal-mart or a Walgreen's that can impose their will on manufacturers and suppliers through their buying power) will not work for powerless retailers (like a corner bodega or coffee shop or boutique).

With both of these concerns in mind, a successful design must allow legal responsibility for a consumer product exposure to be shifted off the retailer only when it falls on a party with the actual economic power to meet that responsibility, a party with the power to agree to -- and then enforce -- any changes on the supply chain that may be necessary to insure compliance with the warning requirement. In other words, clout is what counts. Responsibility can rest anywhere in the chain, as long as that place has sufficient clout to matter.

Instead of trying to guess where that place might be -- which will vary enormously and unpredictably from case to case -- the regulation should be explicit that an upstream substitute for the retailer's legal responsibility to warn is allowed if and when that substitute "has the economic power to impose" any changes on the supply chain (reformulation of product, provision of warning materials, etc.) that may be necessary to insure compliance with the warning requirement. With that explicit condition, it can then be left to the various parties in the chain to allocate legal responsibility among themselves by contract, as contemplated by OEHHA's draft. Such a condition removes the incentive that is otherwise present, to try to dump responsibility on the least capable or least effective potential defendant in an enforcement action.

5. §25602 – naming specific chemicals

There are reasonable arguments both for and against naming specific chemicals in communicating health warnings to the public. However, for safe-harbor purposes, much difficulty is avoided by not including chemical-specific names; and there is no evidence that warnings with chemical-specific names would be any more effective in carrying out the Act's purposes (see General Comment B, above).

Difficulties include:

- justifying the choice of which chemicals to name and which not to name in the absence of information on relative risk (OEHHA expressly denies "intent to imply that any or all of these chemicals pose greater health risks [than non-named chemicals]") or on any other comparative scientific basis

- inevitably creating a false impression that named chemicals are more risky, notwithstanding OEHHA's small-print denial

- lengthening the safe-harbor message, since more text tends to lessen the impact of the warning independent of the content of the longer text (see General Comment B, above)

- diluting the impact of the triangle symbol and WARNING headline, which are designed for instant comprehension (see General Comment B, above)

--potentially confusing many readers whose chemical knowledge is limited (“is chlorinated tris a bad thing, or is that what’s in swimming pools anyway?”)

--creating two tiers of warnings, which would inevitably create confusion and raise assumptions about why there is a difference between warnings that do and don’t contain chemical-specific names (“is this one really a Prop. 65 warning, since it doesn’t name a chemical”?)

--having only guesswork to rely on in the choice of chemical names (absent any marketing research showing significant differences in which chemical names consumers are likely to recognize, and/or to identify as harmful)

--greatly increasing transition costs for businesses currently giving safe-harbor warnings that fully meet the new requirements except for chemical naming.

The benefits of chemical naming can be realized without these difficulties, by eliminating chemical naming as a safe harbor requirement, but allowing it as an option, providing by regulation that the inclusion of a chemical-specific name or names in a warning shall not by itself disqualify a warning from safe-harbor status.

6. §25603(a)(2) – automatic point of sale warnings

This option should more carefully specify that the warning message must be received by the purchaser before undertaking the purchase, rather than allow a warning “during the purchase.” The latter language can easily be interpreted to permit warnings delivered only after a purchaser has waited in a check-out line, or has provided preliminary credit card information on a website for a multi-item purchase; in other words, at a time where it would be highly inconvenient for the purchaser to change his or her mind in light of the warning. To meet the purpose of the statute, consumer product warnings must be conveyed and received when the purchaser’s choice is still open and unchanneled by the seller – not when there is already the seller’s thumb on the scale. Appropriate language would clarify that automatically provided warnings (electronic or otherwise) must be provided “prior to the beginning of any payment process for purchase of the consumer product.”

7. §25603(b) – warnings for internet purchases

Tighter drafting is needed to clarify what a hyperlink is supposed to be linked to on the visible screen, to specify that the warning must be situated so that viewing it cannot be avoided by the purchaser (as opposed to a viewing page or pop-up that the purchaser can ignore or decline), and to specify that this requirement applies to California purchasers only. On the internet, structuring such viewing options is trivially easy, keyed for example to the zip code that the potential purchaser enters as part of shipping information (in advance of payment information of course; see Specific Comment 5 above).

8. §25603(d) -- label warnings in other languages

The several “other language” references in this draft are potentially overbroad; for example, as written, the “any label,” etc. provision here would literally apply if a Spanish-language label were placed on a product when offered for sale in Cuba. This provision needs to be limited to “any label . . . provided *to any intended purchaser located in California.*” This would cover products offered nationally, including on the internet, allowing sellers to communicate with non-English purchasers outside California without triggering this requirement.

Similar changes should be made in §25605 for environmental exposure warnings in other languages.

9. §25605 -- “public entrances” and posted signs for affected areas

For purposes of environmental exposure warnings, many affected areas – perhaps most -- will not have identifiable “public entrances.” This concept appears to be derived from, and is appropriate for, enclosed facilities such as amusement parks (see discussion below), but is meaningless for many other affected areas large and small.

If OEHHA intends to limit the posted-sign option to enclosed facilities, §25605(a)(1) should be so limited. If not, it must define realistic requirements for sign placement that will work for affected areas within residential neighborhoods containing multiple public streets; within publicly accessible regions (such as public parks, other public spaces, and private lands with public access) where the affected area is not served by public streets; and within spaces to which public access is restricted.

The regulation must also recognize that some “affected areas” will be indoors and relatively small, while others may be both indoors and outdoors, and some may be as large as square miles (such as the downwind warnings for ethylene oxide emissions from hospitals, carefully negotiated in settlement over 20 years ago). Different requirements are needed for different types of affected areas. (Note that the current draft as written would allow a newspaper warning to be given for an environmental exposure occurring inside a single indoor room.)

Posted signs will work best for affected areas within indoor spaces and within enclosed outdoor facilities with defined public entrances, and should be the only allowed warning option for those situations. The latter is discussed below in the context of amusement parks.

Where there are not clear public entrances (i.e., other than indoor spaces and enclosed outdoor spaces), defining the required location of posted signs is critical. They should be required at all of the most likely points of access to the affected area, based on the likely pathways of public access (which may or may not be streets or roads).

Newspaper warnings should be limited to affected areas of large size in which posted signage would be impractical. In other words, they should not be an all-purpose option.

10. §25606 -- maps on posted signs

All posted signs should be required to include actual maps of the affected area, except where a more precise description of the affected area can be given (e.g., “in this room,” or “within 100 feet of this sign”). A map successfully communicates to the sign reader the concept that there is a defined area requiring a warning, and at the same time indicates what that area is in easily understood graphical terms. Since the “affected area” is the responsibility of the party giving the warning to identify, there is no excuse for not providing a map, and the absence of a map simply allows for unnecessary ambiguity and confusion on the part of the sign reader. The posted-sign option will otherwise be very likely to be preferred by parties giving warnings as the least effective warning method, absent a map or equally clear delineation of the area in question.

11. §25608 -- specific warnings in other languages

Instead of being stated in different ways in different specific contexts, the other-language condition should be stated as a condition of general applicability for all specifically identified warnings in §25608, to avoid internal inconsistencies and to deny any implication that for any specific §25608 warning where it is not restated, it does not apply.

12. §25604(a)(2) – “for more information” link to website

Requiring a website link as part of a safe harbor warning inevitably makes the warning longer, harder to read and comprehend, and more complex, contrary to the fundamental purpose of the Act; see General Comment B, above.

As a legal matter, it runs afoul of the seminal 1992 decision in *Ingredient Communication Council v. Lungren* (cited by OEHHA on p. 2 of its Initial Statement of Reasons), which rejected warnings that depended on the recipient taking the extra step of calling a toll-free number. Requiring the recipient to take the extra step of going online and interacting with a website is simply a more modern version of the same burden, equally unlikely to be shouldered by most recipients of the initial message, and equally illegal in relying on them to do so.

As a practical matter, it is even less likely that most potential purchasers today will stop to go online in the midst of their purchase-deciding process (later is too late -- see Specific Comment 5, above) than it was that purchasers in 1990 would stop to find a telephone and call a toll-free number. Even if web access is as near as a smart phone in a purse or pocket, few will bother. But for most, that access is not practically available until long after the purchase, in a separate location (such as home or a library), violating the

fundamental point that warnings to be meaningful must be received *before* the purchase decision (see Specific Comment 5, above).

Finally, any element of a safe harbor warning that requires web access in order to be understood would illegally discriminate against the very groups in society that arguably most benefit from clear and reasonable warnings: the less affluent, the less educated, and less leisurely. It is ironic that OEHHA shows concern for citizens who do not easily speak English, but not for citizens who don't own a smart phone or carry a smart tablet with them at all times.

It would be appropriate to offer useful information online as additional information, consistent with the "additional information" requirements of the anti-dilution provision (see Specific Comment 1, above). But it and reference to it should not be hard-wired into the safe harbor formula, since doing so would be a form of double dilution – both lengthening and complexifying the basic message, and making it less comprehensible on its own by depending on the recipient to take additional steps on his or her own, contrary to *ICC v. Lungren*.

13. §25604(b) – web reference for “cancer” and “reproductive harm”

For the same reasons as stated in the previous comment, safe harbor requirements should not include web references to explain the term “cancer” or “reproductive harm.” These terms have proven to be self-evident over the past 25 years of Prop. 65 experience, with no evidence of lack of comprehension on the part of recipients of the existing safe harbor wording. The addition of a required online link creates an improper impression of ambiguity about the meaning of those two key terms (which appear directly in the Act), implying falsely that “you don't really understand what this means unless you look it up,” and thereby undermining the impact of the written message by itself (which is all that most recipients will read; see Specific Comment 8, above). See also General Comment D, above.

14. §25605(a)(1) -- environmental exposure signs

These should be “clearly,” not just “reasonably,” associated with the location and source of the exposure.

15. §25605(a)(3) -- newspaper warnings

Any newspaper permitted to be used for warning should have actual (and non-trivial) circulation in the affected area; in other words, readers of the newspaper within the affected area should actually be likely to see it. This is OEHHA's intent, but clarification is needed here.

16. §25608, all subparts –specifying types of exposure

Every specific subpart in §25608 needs to be explicitly targeted to the type of exposure intended; for example, the diesel warning in an owner’s manual may suffice for warning about a consumer product exposure to diesel emissions, but certainly is not intended to apply to environmental exposures to diesel emissions (although as drafted, it appears to). See comment re furniture products below for a more extended discussion, illustrating the point. §§25608.1 through 25608.27 inclusive need this change.

17. §25608.12 -- furniture products

This section is designed only for consumer product exposures to furniture – i.e., when the buyer or her family members and guests in her home are the persons being exposed -- and it should be limited accordingly to “consumer product exposures”.

Other potential exposures to furniture fall within the definition of environmental exposures (e.g., the couch in a doctor’s waiting room, or the chair in an airport) or occupational exposures (e.g., the couch in the employee lounge of a business). These should be treated as environmental and occupational exposures respectively, either by omission (which makes them subject to the general provisions for those types of exposures), or, if desired, by special provisions in this section that are tailored to those different situations – which will have potentially different parties responsible for providing warnings, and different practical considerations about effective communication to exposed persons (e.g., a notice on a sales receipt to an airline does not communicate to the passengers in its waiting area).

18. §25608.20 -- amusement park definition and coverage

There is no definition of the type of “facility” to which this section applies, and “amusement park” is not a legally reliable term.

Presumably OEHHA intends this specialized type of warning for enclosed facilities with paid admission, inside which a range of outdoor and indoor recreational activities can be enjoyed, at least some without additional charge. A clear definition is needed. Athletic stadiums would presumably be included, since their configuration and range of potential exposures present the same warning issues as a Disneyland or a local water slide. Revising the general provision for environmental exposures, to include a subset for enclosed spaces generally, would be more useful than having special rules only for one type of enclosed space that is not distinguishable from others in the nature of the exposures or locations involved, or in the nature of the recipients of warnings.

The public-entrance sign provision should not always be the only required sign location; additional signs should be required where, for example, the enclosed area is very large and the affected area or areas are small and easily posted, and/or are distant

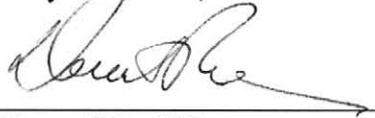
from the entrance (for example, a 100-foot radius around a single ride in Disneyland located a 20 minute walk from the entrance). These situations should be covered by a more carefully tailored general requirement for environmental exposure warnings in the form of posted signs in enclosed areas, making it unnecessary to have a separate requirement for amusement parks alone.

The provisions of this section should be explicitly limited to environmental exposures only. Consumer product exposures should be subject to the same requirements as for such exposures anywhere else, with no different rules for enclosed facilities. Also, parking garage exposures should be subject to the parking garage section, no differently than parking garage exposures that are located elsewhere.

19. §25608.21 -- amusement park warning

It is potentially inaccurate and misleading to say that “locations” can expose patrons; it is “activities” within the facility that can do so (some of which may do so within defined subareas). The warning-sign text should use the term “activities inside this facility,” which more appropriately prompts a reader to seek more information.

Respectfully submitted,



Law Offices of David Roe
davidroe@mail.com
510-207-2836