

**Notice Of Proposed Rulemaking  
And Announcement Of Public Hearing**

**Title 27, California Code Of Regulations**

**Proposed Repeal Of Article 6 And Adoption Of New Article 6**

**PROPOSITION 65  
CLEAR AND REASONABLE WARNINGS**

**November 27, 2015**

NOTICE IS HEREBY GIVEN that the Office of Environmental Health Hazard Assessment (OEHHA) proposes to repeal the current Article 6 regulation and adopt a new regulation in Article 6 in Title 27 of the California Code of Regulations. The January 16, 2015 regulatory proposal to repeal and adopt Article 6 was withdrawn on November 27, 2015 to allow sufficient time for public comment regarding modifications to the proposed regulatory language. This proposal replaces the January 16, 2015 proposed regulatory action. This proposal takes into account all comments received on the earlier proposal.

These new regulations would further the “right-to-know” purposes of the statute and provide more specific guidance on the content of safe harbor warnings for a variety of exposure situations, and corresponding methods for providing those warnings. The proposed regulations would also add a specific section to the regulations addressing the relative responsibilities for providing warnings for businesses in the chain of commerce versus retail sellers of a given product.

**PUBLIC PROCEEDINGS**

Public Hearing

A public hearing will be held on January 13, 2016, at which time any person may present statements or arguments orally or in writing relevant to the action described in this notice. The public hearing will commence at 10:00 a.m. in the Coastal Hearing Room, California Environmental Protection Agency Building, 1001 I Street, 2<sup>nd</sup> Floor, Sacramento, California and will last until 12:00 noon.

Written Comment Period

Any written comments concerning this proposed regulatory action, regardless of the form or method of transmission, must be received by OEHHA by **5:00 p.m. on January 22, 2016**, the designated close of the written comment period. All comments will be posted on the OEHHA website at the close of the public comment period.

The public is encouraged to submit written information via e-mail, rather than in paper form. Send e-mail comments to [P65Public.Comments@oehha.ca.gov](mailto:P65Public.Comments@oehha.ca.gov). Please include "Clear and Reasonable Warning Regulations" in the subject line. Hard-copy comments may be mailed, faxed, or delivered in person to the appropriate address below.

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Please be aware that OEHHA is subject to the California Public Records Act and other laws that require the release of certain information upon request. If you provide comments, please be aware that your name, address and e-mail may be available to third parties.

## **CONTACT**

Inquiries concerning the proposed Proposition 65 regulation described in this notice may be directed to Monet Vela at (916) 323-2517, or by e-mail at [monet.vela@oehha.ca.gov](mailto:monet.vela@oehha.ca.gov), or by mail to OEHHA, P.O. Box 4010, Sacramento, California 95812-4010. Mario Fernandez is a back-up contact person for inquiries concerning processing of this action and is available at (916) 323-2635 or [mario.fernandez@oehha.ca.gov](mailto:mario.fernandez@oehha.ca.gov).

## **AUTHORITY**

Health and Safety Code section 25249.12 and Health and Safety Code section 25249.8(a).

## **REFERENCE**

Health and Safety Code sections 25249.5, 25249.6, 25249.8(a), 25249.10, 25249.11 and 25249.12

## **INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW**

## **BACKGROUND**

OEHHA is the state entity responsible for the implementation of Proposition 65.<sup>1</sup> OEHHA has the authority to adopt and amend regulations to make specific and further the purposes of Proposition 65. OEHHA maintains a list of chemicals known to cause

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<sup>1</sup> The Safe Drinking Water and Toxic Enforcement Act of 1986, codified at Health and Safety Code section 25249.5 *et seq.*, commonly referred to as "Proposition 65".

reproductive toxicity or cancer. Proposition 65 requires businesses to provide a warning when they knowingly and intentionally cause an exposure to a listed chemical, and prohibits the discharge of listed chemicals into sources of drinking water.

Under the existing Article 6 regulation, a warning is “clear” if it clearly communicates that the chemical in question is known to the State of California to cause cancer, birth defects or other reproductive harm. It is “reasonable” if the method employed to transmit the message is reasonably calculated to make the warning message available to the individual prior to exposure. However, the existing safe harbor warnings lack the specificity necessary to ensure that the public receives useful information about potential exposures.

In proposing this regulatory action, OEHHA intends to address many of the issues that have surfaced since the original regulation was adopted in 1988 by clarifying the relative responsibilities of manufacturers and others in the chain of distribution for providing warnings for products that are eventually sold at retail. The proposed regulations would also make needed changes to the current requirements for a “safe harbor” warning by integrating new technology, providing more useful information to Californians about their exposures to listed chemicals and by providing more compliance assistance for affected businesses, thereby furthering the purposes of the Act.

## **SPECIFIC BENEFITS OF THE PROPOSED REGULATIONS**

The proposed regulation will benefit the health and welfare of California residents and improve worker safety by providing more information to the public and facilitating businesses’ compliance with the Act. More informative warnings will further the purposes of Proposition 65 by helping the public to make informed decisions regarding the products they choose to purchase and the places they frequent based on information about their exposures to chemicals that cause cancer or reproductive effects. Because businesses are given the option to use warning methods adopted by the lead agency, businesses will have more certainty and confidence that they are in compliance with the regulations while retaining the right to provide other non-safe harbor warnings they believe are compliant with the Act.

The proposed regulation will benefit Californians by:

- Making warnings more visible (due to the use of the familiar exclamation point symbol for most warnings)
- Stating that the product or the location can expose them to a listed chemical (as opposed to the current general practice of simply warning of the presence of a chemical)
- Identifying at least one listed chemical to which they would be exposed
- Providing the URL for an OEHHA web site which will provide general information about listed chemicals, products or locations commonly associated with those chemicals, and general advice for how to reduce or avoid exposures to those chemicals.

- Providing for warnings in non-English languages in instances where product labeling contains information in alternative languages or at locations where signs are posted in those language

## **NO INCONSISTENCY OR INCOMPATIBILITY WITH EXISTING REGULATIONS**

OEHHA has conducted an evaluation and has determined that this is the only regulation concerning Proposition 65 Clear and Reasonable Warnings. Therefore, the proposed regulation is neither inconsistent nor incompatible with any other existing state regulations. The regulation does not change the existing mandatory requirements on businesses subject to Proposition 65, state or local agencies and does not address compliance with any other law or regulation.

## **LOCAL MANDATE/FISCAL IMPACT**

Because Proposition 65 by its terms<sup>2</sup> does not apply to local agencies or school districts, OEHHA has determined the proposed regulatory action would not impose a mandate on local agencies or school districts; nor does it require reimbursement by the State pursuant to Part 7 (commencing with Section 17500) of Division 4 of the Government Code. OEHHA has also determined that no nondiscretionary costs or savings to local agencies or school districts will result from the proposed regulatory action. Also, the proposed action will not create any cost or saving to any state agency, and will not create any cost or savings in federal funding to the state.

## **COSTS OR SAVINGS TO STATE AGENCIES**

Because Proposition 65 by its terms<sup>3</sup> does not apply to any state agency and this regulation is simply a clarification of existing procedures, OEHHA has initially determined that no significant savings or increased costs to any state agency will result from the proposed regulatory action.

## **EFFECT ON HOUSING COSTS**

OEHHA has initially determined that the proposed regulatory action will have no effect on housing costs because it does not impose any new mandatory requirements on any business.

## **SIGNIFICANT STATEWIDE ADVERSE ECONOMIC IMPACT DIRECTLY AFFECTING BUSINESS, INCLUDING ABILITY TO COMPETE**

OEHHA has made an initial determination that the adoption of the proposed regulation will have an impact on some business sectors. OEHHA has, however, determined that the proposed regulation will not have a significant *statewide* adverse economic impact

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<sup>2</sup> See Health and Safety Code section 25249.11(b).

<sup>3</sup> See Health and Safety Code section 25249.11(b).

directly affecting businesses, including the ability of California businesses to compete with businesses in other states. Proposition 65 and this regulation apply equally to California and all out-of-state businesses that sell products in California. Impacts on facility operation costs are minor. **Additional detailed information regarding the estimated economic impact of these regulations can be found in the Economic Impact Statement, which is included in the Initial Statement of Reasons as Appendix B.**

## **RESULTS OF ECONOMIC IMPACT ANALYSIS (Gov. Code section 11346.3(b))**

Upon reviewing the results of the Economic Impact Assessment, OEHHA has determined that the adoption of the proposed amendments to the regulation will have an impact on some business sectors. OEHHA estimates that the economic impact of the proposed regulation to be between 15 to 30 million dollars per year in the two years before full implementation of the regulation. The regulation is thus below the threshold for a major regulation, and no Standardized Regulatory Impact Assessment (SRIA) is required.

The mandatory provisions in Subarticle 1 of the proposed regulation are related to the responsibility to provide warnings, and provide guidance on determining which party has the responsibility of providing warnings that must already be provided under the Act for exposure to a listed chemical. Subarticle 2 of the proposed regulation does not impose any new requirements upon private persons or business because it provides non-mandatory guidance and a voluntary safe harbor process for providing warnings already required under the Act that businesses can choose to follow. A business may continue to provide the warnings required by Section 25249.6 of the Act in any manner and with any content they can show is “clear and reasonable” under the law. Businesses that decide to convert from the current safe harbor warning to the safe harbor warning described in the proposed regulation will incur costs, primarily for relabeling products or purchasing new warning signs. The regulation includes a two-year phase-in period that would allow businesses time to convert to the new warnings. Additionally, the proposed regulation provides that a warning for a consumer product manufactured prior to the effective date of the regulation is deemed to be clear and reasonable if it complies with the September 2008 revision of the regulation. Many business costs frequently attributed to Proposition 65 such as defending lawsuits, paying attorney’s fees and penalties, determining the chemical exposures from products, reformulating products to avoid the need to provide warnings, etc., fall outside the scope of this regulation.

OEHHA concludes that it is:

- (A) Unlikely that the proposal will have a major impact on the creation or elimination of jobs within California
- (B) Unlikely that the proposal will have a major impact on the creation of new businesses or the elimination of existing businesses within California
- (C) Unlikely that the proposal will have a major impact on the expansion of existing businesses within California

(D) Likely that the proposal will benefit the health, safety and welfare of California residents.

### **Creation or Elimination of Jobs within the State of California**

This regulatory action will not likely have a major impact on the creation or elimination of jobs within the State of California. **Additional detailed information regarding the estimated economic impact of these regulations can be found in the Economic Impact Statement, which is included in the Initial Statement of Reasons as Appendix B.**

### **Creation of New Businesses or Elimination of Existing Businesses within the State of California**

This regulatory action will not likely have a major impact on the creation of new businesses or the elimination of existing businesses within the State of California. The economic impact of the proposed regulation is very small relative to any one establishment's typical cost of operation and the need for business to be created or eliminated as a result of the proposed regulation does not exist.

### **The Expansion of Businesses Currently Doing Business within the State**

OEHHA does not anticipate any major impact on the expansion of businesses currently doing business within the state because the proposed regulation will not change whether warnings are required by a business. The proposed regulations focus on the manner in which the warnings are being provided, i.e., the content and methods for warnings. While businesses can download and print signs on their own, vendors of Proposition 65 warning signs may, however, experience increased activity during the implementation period due to purchase of new warning signs.

### **Benefits of the Proposed Regulation**

The health and welfare of California residents will likely benefit from the increased information regarding exposures to listed chemicals and the clarity provided to businesses complying with the clear and reasonable warning requirements of the Act. More informative warnings will further the purposes of Proposition 65 by increasing the public's ability to make informed decisions regarding the products they choose to purchase and the places they frequent based on information about their exposures to chemicals that cause cancer or reproductive effects. Because businesses are given the option to use warning methods adopted by the lead agency, a business will have more certainty and confidence that it is in compliance with the statute while retaining the right to provide other non-safe harbor warnings they believe are compliant with the Act.

## **CONSIDERATION OF ALTERNATIVES**

Pursuant to Government Code section 11346.5(a)(13), OEHHA must determine that no reasonable alternative considered by OEHHA, or that has otherwise been identified and brought to the attention of OEHHA, would be more effective in carrying out the purpose for which Proposition 65 is proposed, or would be as effective and less burdensome to affected private persons than the proposed action, or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

## **EFFECT ON SMALL BUSINESSES**

OEHHA has determined that the proposed regulatory action will not affect small business as it does not impose any mandatory requirements on small businesses. Proposition 65 expressly exempts businesses with less than 10 employees<sup>4</sup> from the warning requirement of the law.

## **KNOWN COST IMPACTS**

OEHHA has estimated the cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

## **BUSINESS REPORTING REQUIREMENT**

The regulation requires a retail seller, upon request of certain individuals, to provide information regarding product information and the identity of the manufacturer, producer, packager, importer or distributor who have the duty to warn. As an example, the Attorney General may request information from the retail seller regarding product information concerning an item described in a notice of violation. OEHHA finds that it is necessary for the health, safety, or welfare of the people of this state that the proposed regulation which requires a report apply to businesses.

## **AVAILABILITY OF STATEMENT OF REASONS AND TEXT OF PROPOSED REGULATIONS**

OEHHA has prepared and has available for public review an Initial Statement of Reasons for the proposed regulation, all the information upon which the regulation is based, and the text of the proposed regulation. These documents are available on OEHHA's web site at [www.oehha.ca.gov](http://www.oehha.ca.gov).

## **AVAILABILITY OF CHANGED OR MODIFIED TEXT**

The full text of any proposed regulation that is changed or modified from the express terms of this proposed action will be made available at least 15 days prior to the date on

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<sup>4</sup> Health and Safety Code section 25249.11(b).

which OEHHA adopts the resulting regulation. Notice of the comment period on the revised proposed regulation and the full text will be mailed to individuals who testified or submitted oral or written comments at the public hearing, whose comments were received by OEHHA during the public comment period and anyone who requests notification from OEHHA of the availability of such change. Copies of the notice and the changed regulation will also be available on the OEHHA Web site at [www.oehha.ca.gov](http://www.oehha.ca.gov).

#### **AVAILABILITY OF THE FINAL STATEMENT OF REASONS**

A copy of the Final Statement of Reasons may be obtained, when it becomes available, from Monet Vela at the e-mail or telephone number indicated above. The Final Statement of Reasons will also be available on OEHHA's web site at [www.oehha.ca.gov](http://www.oehha.ca.gov).

OFFICE OF ENVIRONMENTAL  
HEALTH HAZARD ASSESSMENT

Allan Hirsch  
Chief Deputy Director

Dated: November 27, 2015