June 13, 2014

BY E-MAIL

Monet Vela
Office of Environmental Health Hazard Assessment
California Environmental Protection Agency
1001 “I” Street
Sacramento, CA 95812

Re: Revision of Proposition 65 Warning Regulations

Dear Ms. Vela:

I submit this information to the Office of Environmental Health Hazard Assessment in conjunction with testimony I offered at the April 14, 2014 Proposition 65 workshop on potential amendments to Article VI, Clear and Reasonable Warnings and as a supplement to the April 10, 2014 letter that I submitted shortly before that workshop. Please distribute this to those to whom it may be useful, and please make this letter, my April 14, 2014 letter, and my testimony at the workshop part of the rule making file for this matter.

25 Years of Experience Has Shown, “Will Expose You To” Must Be Part of the Text of a Prop 65 Warning Message

OEHHA should be commended for contemplating changing the Proposition 65 warning regulations to make them more effective as warnings. First and foremost, the drafts circulated, generally, inform the public that they will be “exposed” to a listed chemical. This is a much more effective warning than one that tells the public that certain areas or products “contain” a listed chemical.

The Act Requires Warning About Exposure

The Act requires that a person be warned about exposure, not the content of a product or the air or water at a particular location. Turning first to the 1986 official ballot pamphlet
prepared for California’s voters, the ballot argument in favor of Proposition 65, under the heading, “WARNING BEFORE EXPOSURE” states that, “Proposition 65 also tells businesses: Don’t expose us to any of these same chemicals without first giving us a clear warning. We each have a right to know, and to make our own choices about being exposed to these chemicals.”

The rebuttal to the argument against Proposition 65 states, “Proposition 65 simply says that businesses shouldn’t put chemicals that are scientifically known to cause cancer, or birth defects into our drinking water. And that they must warn you before they expose you to such a chemical.” The gravamen of the Act is a warning about exposure that enables informed decision making.

OEHHA has recognized this in the Final Statement of Reasons for 22 Cal. Code Regs. § 12601 (changed to 27 Cal. Code Regs. § 25601). OEHHA had originally proposed to require that warnings inform people that they “were being exposed” to a listed chemical. OEHHA changed its mind about this requirement because OEHHA noted that,

The requirement that the warning advise that the individual “is being exposed” was not consistent with the requirement under the Act that exposed individuals receive prior warning. If a person “is being exposed” at the time of the warning, it is not a prior warning.

(See FSR 27 Cal. Code Regs. § 25601 at pp. 2-3.) OEHHA replaced the deleted “is being exposed” requirement with a requirement that the warning inform people of the presence of the listed chemical. OEHHA reasoned that,

[B]y communicating that a listed chemical is present, i.e., that the chemical in question is listed, the fact of potential exposure would normally be implied. It does not appear necessary in every case to specifically state that an exposure will take place. Also, it is unclear how such a specific statement would be made. If made in the present tense (“you are being exposed”), the message would be inconsistent with the requirement that warnings precede exposure. If made in the future tense (“you will be exposed), it would also be necessary to state the condition which will result in the exposure, e.g., “entering this area” or “using this product.” Stating the condition would make the warning longer and more cumbersome, both to the business giving it and the reader.

(FSR 27 Cal. Code Regs. § 25601 at p. 4.)

**Experience Proves that for Most Exposures “Contains a Chemical” Doesn’t Convey a Warning about Exposure**

As my April 10, 2014 letter and its supporting documentation made clear, warnings about the presence of a listed chemical do not communicate exposure unless there is a tight nexus between the object or condition causing the exposure and the warning. Simply telling a person that a large area, or a non-food object contains a listed chemical does not allow the person to
understand what OEHHA had supposed would be implicit – that the area/object/process/condition would cause an exposure. This is why Proposition 65 warnings are often ridiculed – telling somebody that “Disneyland contains chemicals known to cause cancer” doesn’t communicate anything useful. It appears to be meaningless, empty recitation, done simply for the purpose of mouthing empty platitudes. These kinds of warnings certainly do not inform about exposure in a way that enables informed decision making about the exposure.

As the ballot pamphlet makes clear, Proposition 65 was intended to be much more effective than requiring the recitation of empty platitudes. Given the experience that has been gained now over more than 25 years of Proposition 65 compliance and enforcement, it is imperative that Proposition 65 warning regulations actually communicate exposure so that people can understand and act on the warning. If that means making the warnings slightly longer and more cumbersome, so be it. I do not believe, however, that revised, more effective, warnings need be significantly longer or more cumbersome than is required under the current warning regulations. Regulations must, however, be clearer about the kind of warning that is required for the type of exposure in question.

**Conveying Exposure in Warning Texts Will Not Require Unreasonably Longer Warnings**

Current warning regulations require that the warning message “This [product] [area] contains chemicals . . . .” be provided where there is a nexus between the warning and the source of exposure. For example, current 27 Cal. Code Regs. § 25603.1 requires that consumer product warnings be given on the product or its label, or that the warning identify the product on a sign or shelf label and then give the warning. Similarly, 27 Cal. Code Regs. § 25605.1 requires that the warning, “This area contains chemicals . . . .” be given in the “affected area”, which is defined as the area in which the listed chemical is at a level that requires a warning. (27 Cal. Code Regs. § 25602(a).)

Requiring that the warning use the word “exposure” would not significantly expand or complicate the warning message. There is only a four word difference between telling someone that the area or product “contains a chemical” on the one hand, and telling him or her that the area or product “will expose you to a chemical” on the other hand. A small increase in the number of words eliminates confusion and provides a much clearer and more effective warning. It would thus be “reasonable” to require the extra four words.

**Warning Regulations Should be Tailored to Common Media and Routes of Exposure**

The trick in making a warning regulation clear and effective – and thus less subject to gaming by litigants on either side of the enforcement divide – is to be as specific as possible about which conditions require which method of transmission and which warning message. For this reason, I suggest that OEHHA focus on how people are exposed. OEHHA can then tailor warnings – messages and methods of transmission – to the general exposure scenario. Current
27 Cal. Code Regs. § 25102(i) defines “expose” to mean, “to cause to ingest, inhale, contact via bodily surfaces or otherwise come into contact with a listed chemical through water, air, food, consumer products and any other environmental exposure as well as occupational exposures.”

There are Common Ways People are Exposed to Listed Chemicals

The same ways that people are exposed – by eating food, by drinking water, by breathing air; and by having air, water or objects contact their bodily surfaces – apply regardless of whether the exposure occurs while a person is consuming or using a product, and whether one is at work or simply out in the environment. A communication provides a warning about an exposure if it describes or identifies the source and means of the exposure (conveying how a person will be exposed) with reasonable precision and provides the warning message in reasonably close proximity to the source of exposure.

There are some categories of exposure that are ubiquitous and would be easy to describe in regulations and for which it would be simple to prescribe clear and reasonable warning messages and their methods of transmission. These categories are: 1.) Consumer goods – objects sold at retail to people to satisfy their consumer needs. These include food. What they have in common is that these goods are physical objects that are purchased at retail in advance of use. 2.) Indoor air, such as in a restaurant, parking garage, school, bus, movie theater or other confined area. 3.) Outdoor air, in an unconfined area, such as within a particular isopleth around a factory or construction site. 4.) Outdoor air in close proximity to a process or machine – such as a diesel generator, lawn mower or plasma cutter. 5.) Indoor water that a person drinks or contacts, such as a drinking fountain, or water in a swimming pool or spa. 6.) Outdoor water that a person drinks or contacts, such as a well, river or lake. 7.) Objects (whether indoor or outdoor) – such as a bronze statue, brass rail or stanchion, or arsenic-treated wood – that a person touches with his or her skin. These seven exposure situations account for the great majority of common exposures to listed chemicals.

Consumer Goods

Current regulations subsume “consumer services” under the rubric of “consumer product” warnings. Current consumer product warnings currently allow a consumer to be told that the product “contains a chemical.” This makes little sense when applied to a consumer service, such as dog shampooing, dry cleaning or lawn care. In those cases, it is the service or the procedure that will expose a person to a listed chemical. What is the product? It makes much more sense to remove consumer services from consumer product warning regulations and to focus consumer product regulations on exposures caused by consumer goods, which are tangible objects, such as cans of paint, bottles of nail polish or backpacks. Consumer service warnings can be given based on how the exposure occurs – by the type of service or procedure, or by warning about chemicals in the air in, say, a body shop or a nail salon.

For consumer goods (possibly with the exception of food) a warning can be transmitted in the same ways warnings are now required to be transmitted. For a warning placed on the
consumer good itself, all that need be said is that, “Using this product will expose you to a chemical . . . .” For warnings that are not provided on the product, the warning text (sign, placard, pamphlet, shelf-label) must describe the product with reasonable particularity and then inform the prospective consumer that “[Name of product] will expose you to a chemical . . . .”

**Indoor Air Exposures**

For indoor air exposures, signs or placards at the entrance to the affected area can be posted that say, “Entering [Describe affected area – This restaurant, This theater] will expose you to a chemical . . . .”

**Outdoor Air Exposures**

For outdoor air exposures within certain isopleths around a stationary source of pollution, obviously, the warning will have to be mailed or delivered in some other way to individuals who live or work in the affected area. The warning should identify the stationary source and inform people that the source is exposing them to a chemical that causes cancer, and/or birth defects and/or other reproductive harm: “[Name or identification of source of exposure] exposes you to chemicals . . . .”

**Air Exposures Caused by a Process, Procedure or Object**

For air exposures – both indoor and outdoor exposures – that occur via a process or procedure (like welding, lawn care, sand blasting) or from operating machinery (chainsaw, generator, cement saw) the warning should be provided in proximity to the machine or process and it should identify the machine or process and provide the warning: “[Describe the process – welding, soldering, cement cutting, sand blasting] or [Describe the machine – chainsaws, arc welders, diesel equipment] will expose you to chemicals . . . .”

**Indoor Exposures Caused by Drinking or Contact Water**

Exposure to water, even more than exposure to food, is one of the few types of warning for which telling a person “This water contains a chemical . . . .” actually conveys to the person that he or she will be exposed to the chemical. For indoor water that a person contacts or drinks, [Describe the source of exposure – This swimming pool; This drinking fountain] will expose you to chemicals . . . .” Or, “Water in or from [this drinking fountain” or “the swimming pools and spas in this hotel”] contains chemicals . . . .”

**Outdoor Exposures Caused by Drinking or Contact Water**

For outdoor water that a person drinks or contacts – a well, a river, a lake the warning should be in close proximity to the affected area of the water body “[Describe the source of exposure – This lake, This river] will expose you to a chemical . . . .” Or “The water in [Describe the source of exposure and/or the affected area] contains a chemical . . . .”
Exposures Caused by Objects

For objects that cause exposures, the warning should identify the object and be posted in close proximity to the object that causes the exposure: “Contacting or touching [Describe or identify the object – this statue, this wood, the Sword in the Stone] will expose you to a chemical . . . .”

Attached are Drafts that Illustrate How Warnings Tailored to Common Media and Routes of Exposure Could be Drafted

To illustrate the approach I recommend I am attaching re-drafts of some of the draft regulations OEHHA originally circulated for discussion at the April 14, 2014 workshop. I put the warning scenarios within traditional OEHHA categories – Consumer Products, Occupational, Environmental – but removed consumer services from consumer product exposures and placed consumer service warnings within the broader rubric of environmental exposures. As for occupational exposures, I included the current OEHHA language regarding warnings given via various kinds of Hazardous Communication standards, provided those warnings mention exposures to chemicals that cause cancer, birth defects or other reproductive harm. In-state employers are also given the option to provide warnings as specified in the environmental warnings section.

OEHHA Should Eliminate the Occupational Exposure Warning Option to Post a Single Sign in the Workplace

Of all the warnings allowed under the current warning regulations, the most objectionable is 27 Cal. Code Regs. § 25604.1(a)(2), which simply allows a warning “that appears on a sign in the workplace . . . .” That might be fine for a small shop or nail salon, but workplaces can be huge – a forest, a farm field, a giant construction site, an automobile factory. For this reason, occupational exposure warnings that are provided by means other than Hazardous Communication Standards should be subsumed under the rubric of environmental exposure warnings, based on the medium and route of exposure.

OEHHA can Tailor Special Warnings for Unusual or Technical Types of Exposures – Dentistry, Surgical Procedures, Drugs

For certain classes of exposures there is a specialized or unusual way that exposures occur, or the exposure occurs within a heavily regulated industry. People can be exposed while they are under general anesthetic or they can be exposed to a product used on them by a doctor or dentist. An exposure can occur via products that are subject to strict and comprehensive federal regulation, such as drugs. OEHHA should continue to identify these special or unusual exposure situations for which a warning method and message may be tailored to the specific exposure and/or regulatory environment. So long as the source of exposure is communicated as reasonably close as possible in proximity (both geographic and temporal) to the warning message. I
recommend that for communicating numerous sources of exposure, or more involved routes of exposure, businesses should be allowed to supplement a more general warning with a pamphlet and/or a smart-phone compatible graphic that can be scanned and then have more detailed information provided via the web.

For Excused Inadvertent Failures to Warn, the Burden Must be on the Business Causing the Exposure to Prove Warnings were Being Given Before and After the Temporary Failure to Provide a Warning

Businesses should be allowed some slack in cases where they fail to provide a warning because, for example, the web or a website is down, or if signs or pamphlets have been stolen or have run out. The analogy would be exceptions in the federal Clean Water and Air Acts that do not penalize discharges that occur as the result of an anomaly or accident. In such an event, it should be the burden of the business to prove that warnings had consistently been given both before and after the unusual event that caused the temporary pause in warning. Please note: what I recommend is not a notice and cure provision. A business should not be allowed to wait until it is given notice that there is no warning posted before providing one. A business that knows it is exposing people to a listed chemical – and intends the exposure – must be held responsible for providing a warning even before the business has been “caught” failing to provide a required warning. This is simply what is required under the statutory language of the Act. A business is already exempt from liability for failure to warn if an enforcer cannot prove the business knew about and intended the exposure.

The Current Proposed Draft for Section 25606 Will be a Full Employment Act for Lawyers

I join Howie Hirsch in his comment concerning proposed section 25606, which attempts (for consumer “products”) to apportion between manufacturers, distributors and packagers on the one hand, and retailers on the other, the responsibility for providing a warning. A regulation simply invites endless litigation when it contains language like, “in most cases” and “the primary responsibility.” As Mr. Hirsch notes, Proposition 65 is enforced through civil litigation. How can courts make sense of such vague language? It would be ultra vires to the Act if retailers were to be exempt from Health & Saf. Code § 25249.6, yet that is precisely what one plausible reading of “any consequences for failure to comply with this article shall be the primary responsibility of the manufacturer, producer, distributor or packager” of the product would allow. As OEHHA fully knows, the opening language of Health & Saf. Code § 25249.6 reads, “No person in the course of doing business shall knowingly and intentionally expose . . . without first giving clear and reasonable warning . . . .”

Additionally, as currently drafted, proposed section 25606 is particularly unsuited to the current global economy and the realities of the balance of power that exists between retailers and manufacturers of consumer goods. Consumer goods are often made by small businesses in
foreign countries like China, Malaysia or Bangladesh. These goods are commonly made to the specifications of giant, highly sophisticated retailers such as Target or Wal Mart (often with a trading company acting as the agent or intermediary on behalf of the retailer). It is judicially uneconomical, ridiculous and unfair to give Wal Mart an argument that it is exempt from having to give a Proposition 65 warning because OEHHA’s regulations place the burden of providing the warning on a family business in China that produces the good in question in an old shipping container in their back yard. Yet that is precisely what proposed Section 25606 in its current formulation would provide Wal Mart. Why would OEHHA want to do that?

Though Wal Mart should by no means be given this kind of argument (nor should any other giant retailer), the apportionment of warning responsibility would at least be more in line with the current realities of the global marketplace if the warning also placed the “primary responsibility” “in most cases” to provide a warning on the importer of a consumer good, as well as on the manufacturer, distributor or packager.

Once again, OEHHA is commended for attempting to update Proposition 65 warning regulations and to make them more effective in light of the 25 years of experience we now have at enforcing and complying with the Act. Please contact me if you have any questions.

Cordially,

William Verick

cc: Carol Monaghan
    Susan Fiering

Attachments
§ 25607.1 Consumer Goods Exposure Warnings – Methods of Transmission for Consumer Goods Other than Foods, Prescription Drugs, Medical Devices and Dental Care

(a) For consumer goods other than food, the warning required under Health and Safety Code section 25249.6 shall comply with content requirements contained in Section 25607.2 and shall be provided using one or more of the following methods singly or in combination.

(1) The warning message is on the consumer good’s labeling that is provided directly to the purchaser of the consumer good using the format, content and size specified in subsection 25607.2(b).

(2) For internet purchases, the warning message is provided on the internet prior to the time the consumer inputs payment information for purchase of the consumer good.

(3) For catalog purchases, the warning message is provided in the catalog in a manner that clearly associates it with the item being purchased.

(4) A consumer good-specific warning provided on a shelf-tag or on a shelf sign for the product at each point of display of the product. The entire warning message must be in a print font no smaller than 36 points. A consumer good-specific warning provided on a shelf tag or shelf sign must be provided in close enough proximity to the display of the consumer good, and be described such that any person reading the warning would be reasonably likely to identify the consumer good that causes the exposure and be able to distinguish it from other consumer goods that do not cause exposures to a listed chemical.

(5) A consumer good-specific warning provided via any electronic device or process that automatically provides the warning to the consumer while the consumer is making a purchase, without requiring the consumer to seek out the warning. A consumer good-specific warning provided via an electronic device must be provided in close enough proximity to the display of the consumer good, and be described such that any person reading the warning would be reasonably likely to identify the consumer good that causes the exposure and be able to distinguish it from other consumer goods that do not cause exposures to a listed chemical.

(b) In all cases the warning must be legibly and conspicuously displayed and must be provided in a manner likely to be seen by the consumer under all lighting conditions normally encountered during business hours.

(c) Supplemental information such as a pamphlet or other method for the consumer to obtain additional information concerning the exposure may be provided, but shall not be substituted for the warning methods described in this section. In no case shall such additional information dilute or negate the warning provided pursuant to Health and Safety Code section 25249.6.

NOTE: Authority cited: Section 25249.12, Health and Safety Code. Reference: Section
25249.6, Health and Safety Code.
§ 25607.12 Occupational Exposure Warnings – Methods of Transmission

(a) Warnings for occupational exposure required under Health and Safety Code section 25249.6 shall contain the minimum elements specified in Section 25607.13 and be provided by using one or more of the following methods:

(1) A communication to the exposed employee about the chemical in question which fully complies with all information, training and labeling requirements of the federal Hazard Communication Standard (29 CFR section 1910.1200), or the California Hazard Communication Standard (Cal. Code Regs., title 8, section 5194), or, for pesticides, the Pesticides and Worker Safety requirements (Cal. Code Regs., title 3, section 6700 et seq.) authorized in Food and Agriculture Code section 12981, if the information, training or labeling requirements of the federal Hazard Communication Standard (29 CFR section 1910.1200), or the California Hazard Communication Standard (Cal. Code Regs., title 8, section 5194), or, for pesticides, the Pesticides and Worker Safety requirements (Cal. Code Regs., title 3, section 6700 et seq.) authorized in Food and Agriculture Code section apply to the workplace exposure and include a warning concerning a risk of cancer, birth defects or other reproductive harm from exposure to the listed chemical.

(2) Except where prohibited by federal law, a communication required for environmental exposure warnings under Section 25607.15.

§ 25607.15 Environmental Exposure Warnings – Methods of Transmission

(a) For warnings of environmental exposure, the method employed to transmit the warning required by Health and Safety Code section 25249.6 must include all the content specified in section 25607.16 and be provided using one or more of the following methods:

(1) For environmental exposures that occur via air or water within an affected area that is indoors or otherwise enclosed, a sign posted at the entrances or in close proximity to the source of exposure affected area. The sign shall identify the source of exposure.

(2) For environmental exposures caused by a physical object, such as a statue or machine, a sign posted on or in close enough proximity to the physical object, or that identifies the physical object, such that any person reading the warning would be reasonably likely to identify the exposure with its source.

(3) For environmental exposures caused by a process or procedure, such as painting, rug shampooing, or lawn care, the warning shall identify the process or procedure with sufficient specificity that any person receiving the warning would be reasonably likely to distinguish the source of exposure from other processes or procedures that may be present in the same environment.

(4) For environmental exposures that occur outdoors, such as in a forest, field, park or lake; or indoors in a large confined area, such as a hotel, stadium, construction site or racetrack, a notice mailed, electronically transmitted, or otherwise delivered individually to the persons who are being or who will foreseeably be exposed. A notice provided pursuant to this subparagraph must identify the source(s) of the exposure(s), the affected area(s), water body, physical object(s) or process(es) or procedure(es) with sufficient specificity that any person receiving the warning would be reasonably likely to distinguish the source(s) of exposure from other areas, physical objects or processes or procedures that may be present in the same environment. For environmental exposures that continue longer than three months, such notices shall be provided at least once in every three-month period during which the exposure to those persons occurs.

(b) Environmental exposure warnings shall be provided in a manner that makes them likely to be seen or heard and understood by an ordinary individual in the course of normal daily activity.
§ 25607.16 Warnings – Content

(a) For purposes of sections 25607.1, 25607.12 and 25607.15, the warning message must include all of the following elements:

1. The international health hazard symbol.

2. The word “WARNING” in all capital letters and bold print.

3. For exposures to listed carcinogens, the words “Persons [using (consumer good); in (location); contacting (object); or near (process or procedure)] will be exposed to a chemical known to the State of California to cause cancer.” The consumer good, location, object, process or procedure must be clearly identified in the warning message and shall be expressed in terms of common usage and understanding.

4. For exposures to listed reproductive toxins, the words “Persons [using (consumer good); in (location); contacting (object); or near (process or procedure)] will be exposed to a chemical known to the State of California to cause birth defects or other reproductive harm.” The consumer good, location, object, process or procedure must be clearly identified in the warning message and shall be expressed in terms of common usage and understanding.

5. For exposures to listed carcinogens and reproductive toxins, the words “Persons [using consumer good]; in (location); contacting (object); or near (process or procedure)] will be exposed to a chemical known to the State of California to cause cancer, birth defects or other reproductive harm.” The consumer good, location, object, process or procedure must be clearly identified in the warning message and shall be expressed in terms of common usage and understanding.