

**Before the
Office of Environmental Health Hazard Assessment
California Environmental Protection Agency**

Comments of David Roe

on

March 25, 2016 redraft of

PROPOSED PROPOSITION 65 WARNING REGULATIONS

amending/replacing

California Code of Regulations, title 27, Article 6 Subarticle I
(General) and

Subarticle 2

Submitted April 13, 2016

Background and incorporation of previous comments

Official commitments to revise the Proposition 65 warning regulations, specifically including the so-called “safe harbor” regulations, have been outstanding from the Governor’s office since 2013. OEHHA issued a March 7, 2014, “pre-regulatory draft”; held an April 14, 2014, workshop; extended the public comment deadline and received written comments on June 16, 2014; then issued what purported to be a full regulatory proposal on January 12, 2015, receiving comments on April 16, 2015; then on November 27, 2015, withdrew that proposal and issued another version. Since receiving comments on the November 27 version, OEHHA issued additional revisions in this latest version, dated March 25, 2016. These comments incorporate by reference all my previous oral and written comments submitted in each of the proceedings identified above.

COMMENTS

1. “Supplemental Information” in safe-harbor warnings is now properly authorized and constrained-- §25601(f)

The overbroad definition of “supplemental information” in the November 27, 2015 proposal has been successfully corrected, carrying out the stated purpose of authorizing useful exposure-related information to be included in a safe-harbor warning without creating a large loophole for deceptive or diluting information. It is now also properly located in the safe harbor context only.

2. Requiring identification of the source of environmental exposures in safe-harbor warnings is a major and necessary improvement¹ -- §25604; §25605.

The safe-harbor text for environmental exposure warnings, in §25605(a)(3)-(6), now includes a requirement that the warning text begin with “[Name of one or more exposure sources] . . .” Responding to comments about previous safe-harbor language not being appropriate or clear for different types of environmental exposures, this change compromises by requiring the safe-harbor language to be targeted to the specific source of the exposure in each situation, without having to prescribe exact separate language for each of the several different types of exposure sources (e.g., airborne, dermal contact, ingestion) that environmental exposures by definition include.

Clearly identifying the source goes far toward making the warning meaningful, as this version recognizes not only by adding the bracket language to the safe-harbor texts, but also by requiring in §25604 that mailed notices and newspaper notices “clearly identify the source of the exposure” (*see* §25604(a) (2)(A)&(a)(3)(A)). The attention of the warning’s recipient is at least directed to what she or he might want to stay away from

¹ But see Comment # 4 below about unnecessary confusion in the drafting.

in order to avoid exposure, within what could otherwise be an “affected area” so large and unspecified in terms of risk that a warning would be effectively meaningless.

Regulated parties can be expected to complain that they want exact and fully precise safe-harbor wording in every case, to be sure of avoiding liability for failure to warn. However, this would require numerous different sets of precise language, which themselves could be unclear as to which applied to which situations, and which still might fail to cover all of the possibilities of environmental exposure (because “environmental exposure” as defined is a catch-all term, encompassing the unforeseen). Since Proposition 65 warnings are given only for “knowing and intentional” exposures, the party responsible for the warning necessarily already knows what the source of the exposure is; it is therefore reasonable to expect that such parties can readily fill in the brackets with the name or one or more of the relevant exposure sources. If necessary, to provide additional assurance that reasonable, non-evasive descriptions of specific exposure sources in this context will not create safe-harbor risk, an addition to the Statement of Reasons could provide illustrative language for a few different types of environmental exposure (e.g., “touching [this object]”; “breathing downwind of [this smokestack]”; “wading in [this lake or stream]”; etc.).

3. Time-of-purchase warnings for consumer product exposures remain dangerously ambiguous-- §25602(a)(2)

Despite comments noting the potential of one loophole to swallow most of the methods intended and prescribed for consumer product warnings, this version continues to be ambiguous about whether a consumer product exposure warning must be received by the potential consumer *before* the consumer product is purchased -- leaving uncertainty about whether warnings on cash register receipts or the equivalent would fall within safe-harbor protection.

Cash register receipt warnings have long been proposed by the regulated community; they would be cheap and easy for responsible parties to provide. But -- equally desirable from their point of view, unfortunately -- warnings on cash register receipts would bury the message where it would be unlikely to be seen or understood, and where it would be even less likely to be acted upon (e.g., by foregoing the purchase or choosing an alternative product). For that reason such warnings have never been authorized as a safe-harbor option. They would certainly not be “clear and reasonable” in light of experience and regulatory history, much less their ineffectiveness in practice.

It cannot be OEHHA’s intent to give safe-harbor status to post-purchase warnings, since these and all prior safe-harbor regulations devote considerable attention to a variety of pre-purchase warning methods, including shelf signs, product labels, catalog warnings, etc. Yet all such prescribed methods of consumer product exposure warning would be quickly eclipsed in practice by cash-register receipts if those were authorized, given their advantages from the responsible-party point of view, in terms of minimizing consumer attention and consumer response.

Indeed, in one specific context, OEHHA’s intent on timing for consumer product purchases is explicit: §25602(b) specifies that a warning on the internet must be displayed to the purchaser “prior to completing the purchase.” This makes obvious logical sense, and logically applies to all consumer product purchases in all contexts.

However, §25602(a)(2) in current form refers to safe-harbor warnings provided to the purchaser “prior to *or during* the purchase . . .” [emphasis added]. The ambiguity of what “during” might mean in this context would encourage product sellers to claim that cash register receipts and the like would be authorized. **OEHHA should use the same wording in §25602(a)(2) as it does in §25602(b), that warning must be displayed to the purchaser “prior to completing the purchase.”** [emphasis added] Alternatively, legal precision could be achieved by requiring such warnings to be given to the purchaser “prior to tendering of payment.”

Either way, the potential ambiguity of the term “during” should be eliminated. This is especially important given the large temptation that cash-register warnings would represent, and the decades-long history of lobbying for them that confirms how eagerly they would be embraced by the regulated community if safe-harbor status for them were even hinted at in these regulations.

4. Inconsistent drafting for the source-identification requirement in environmental warnings creates needless confusion and uncertainty.

The improvement noted in Comment #2 above, requiring that environmental exposure warnings include the identification of the exposure source, occurs in multiple provisions. §25604 explicitly provides it for mailed or delivered notices, §25064(a)(2)(A), and for published notices, §25064(a)(3)(A). In the same section, however, it does not do so explicitly for posted notices; *compare* §25604(a)(1)(A).

OEHHA presumably intends that source identification is required for posted notices as well as for mailed and newspaper notices, since the generic language of §25604 provides that all safe-harbor environmental warnings must also “compl[y] with the content requirements of §25605”; and those §25605 content requirements do include the bracketed “[Name one or more exposure sources]” element in all the defined wordings. In other words, the same requirement does cover posted notices, albeit indirectly. Further confirmation of OEHHA’s intent that source identification be included in environmental exposure warnings is found even in the special provision for amusement parks, which requires that the warning “identifies . . . the source of the exposure . . .” and includes the same bracketed element in the prescribed wording; *see* §25607.23(a)(3).²

² The 3/25/16 Notice of Modification accompanying this version of the proposed regulations explicitly states that “Section 25607.23(a) was modified to clarify that . . . *the source of exposure must be included* in the warning . . .” [emphasis added]

Rather than leave any confusion from inconsistency in §25604 language, the three elements of §25604 should be drafted in parallel, so that all three methods (posted notices, mailed notices, and published notices) include the same requirement to “clearly identify the source of the exposure” in all three subparagraphs of subsection (a).

**5. The definition of “affected area” still creates needless uncertainty.
§25600.1(a)**

By defining “affected area” in apparently objective physical terms (the area in which an exposure “can occur” at warnable levels), these proposed regulations set up a potential debate about what area is involved as a matter of physical fact; i.e., what objective scientists, measuring instruments, and dispersion models might calculate with all the facts in hand.

However, as stated above, Proposition 65 warnings are required to be given only for “knowing and intentional” exposures. Therefore, warnings for environmental exposures are required only in the areas within which the responsible party *knows and intends* that the exposure takes place. In defining the area within which warnings are required, the knowledge of the responsible party is the key factor.

Proposition 65 does not require responsible parties to capture all the facts – and indeed, the regulated community routinely complains about the difficulty of determining with precision where an exposure is occurring (or might occur). All the law requires is that the responsible party act on what it does know (i.e., “knowing . . . exposure”). The proper definition of “affected area” is, therefore:

the area in which the person responsible for an exposure knows that the exposure can occur at a level that requires a warning. [emphasis added]

A scientifically objective definition goes too far, by potentially subjecting responsible parties to liability for a wider area of exposure (that which objective study might determine) than what the law requires (what the responsible party actually knows).

Of course, responsible parties strenuously complain that their knowledge is not precise and that their uncertainty forces them to overwarn in terms of affected areas. It may serve their business interests (as well as the public interest) to get more precise knowledge. But it is not required, and the regulations should not imply any such duty as a condition of safe-harbor protection. Potential defendants are entitled to go with what they know, and should not be put to any test more rigorously objective. Nor should they feel they would be gambling at trial over the findings of scientific experts, if those findings were not in their own knowledge base at the time warnings were (or were not) given.

**6. The “retail seller” definition has inadvertently been over-stretched.
§25600.1(i)**

By adding “*or otherwise provides* consumer products” to the definition of retail seller, this version has broadened the application of these regulations to any person who provides any consumer product for free to another, including a food bank distributing apples, or a charitable organization donating blankets to homeless persons, or a department store Santa Claus handing out candy to children. Absurd, but needing to be fixed by returning to the previous language.

This change seems to have been inadvertent, as it is not even mentioned in OEHHA’s identification of changes in its Notice of Modification to Text of Proposed Regulation, which does describe other changes to §25600.1 definitions in detail.

Respectfully submitted,

David Roe