

**Supplement to the Final Statement of Reasons
Title 27, California Code of Regulations**

**Proposed Repeal of Article 6 and
Adoption of New Article 6
Regulations for Clear and Reasonable Warnings**

August 30, 2016



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

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Supplement to the Final Statement of Reasons

This document supplements the Final Statement of Reasons (FSOR) submitted July 19, 2016 as part of the rulemaking for the Article 6 Clear and Reasonable Warnings regulations. The following are modifications to the July 19, 2016 FSOR.

1. General Information/Overview of the New Article 6 (FSOR, p. 8)

In this section, the FSOR stated that “[t]he regulatory action OEHHA is proposing would repeal the current Article 6 regulations and adopt new regulations into Article 6”. However, OEHHA adopted an emergency regulation for exposures to bisphenol A from canned and bottled foods in subsections 25603.3(f) and (g) on April 18, 2016. These provisions have been retained in Article 6, but were relocated and renumbered as sections 25607.30 and 25607.31 to conform with the format and numbering of the new regulatory provisions. Non-substantive revisions to the titles and internal numbering of these sections were made to conform with the format and numbering in the new regulations being adopted by OEHHA. All other provisions of the existing regulations are being repealed and readopted under this rulemaking.

2. Subsection 25600.1(i): “Consumer Product Exposure” (now 25600.1(e)) (FSOR, p. 30)

Comment #39 (AHPA). The comment was inadvertently titled “25600.1(i): ‘Consumer Product Exposure’ (now 25600.1(e))”. The comment was incorporated by reference from a comment related to the now withdrawn Article 6 regulatory proposal from January 2015 - 25600.2(f). The November 2015 regulatory proposal included a modified version of the subsection which was renumbered as subsection (h). The provision was again renumbered in March 2016 to 25600.2(i). The comment should have been included under the heading and subheading “Subsection 25600.2(h) (now 25600.2(i))”/“Written or contractual agreement between parties”.¹

3. Subsection 25600.2(a): Minimizing burden on retail sellers (FSOR, p. 35)

Response to Comment #49. The sentence in the third paragraph, “Under subsection (c), the manufacturer, producer, packager, importer or distributor must obtain confirmation of receipt of this notice from the retail seller within six months during the first year after the effective date of the regulation; thereafter, confirmation of receipt need be obtained only once per year”, should be corrected by adding “(May 20, 2016 modified text)”. The last sentence in the response (page 37) should read “The comment was addressed through the May 2016 changes to the text of the regulations.”

4. Subsection 25602(a): Methods and responsibilities (FSOR, p. 78)

Comment #122 (AHPA). In response to comments from AHPA, the FSOR referred to “Article 1, Section 25600.2” and “Article 2, Section 25601”. As both sections are part of Article 6, the response should have referred to “Subarticle 1, Section 25600.2” and Subarticle 2, Section 25601”.

Comment #123 (AHPA, TVC, and CGA).

The FSOR summarized a portion of the comment as follows:

“The provision is also incompatible with requirements of subsection 25600.2(b)(3) such that a manufacturer, producer, packager, or distributor would not know in advance the type sizes used by retailers for their own promotional signs or tags.”

The FSOR should be clarified to state that this portion of the comment is referring to section 25600.2(b)(3) of the now withdrawn January 2015 proposed regulatory text.

5. Subsection 25602(c): Warnings for Catalog Purchases (FSOR, p. 93)

Comment #144 (AHPA): In response to the portion of the comment recommending the addition of alternative warning methods including providing a warning in a catalog,

¹ Final Statement of Reasons, at 60.

labeling or other literature accompanying the product, there is a typographical error. The FSOR states a warning provided only on a product's labeling when it is sold via a catalog "*would be consistent*" with the regulations safe harbor requirements. The sentence should state that a warning provided only on a product's labeling when it is sold via a catalog "*would not be consistent* with" the subarticle's safe harbor provisions, because the purchaser would only see the warning after receiving the product and would have limited options for returning it.

6. Section 25604: Environmental Exposure Warnings – Methods of Transmission/General (FSOR, p. 120)

Comment #196 (CH&LA): The terms, "affected area," "identifies the area," "clearly identify the area," and "reasonably associated with the location and source of the exposure," are all practically and legally insufficient to guide a business about what must be done to comply with safe harbor provisions. Therefore, they fail the Administrative Procedure Act clarity test.

The response to the comment should be replaced with the following:

Response: The term "affected area" is defined in the regulation as "the area in which an exposure to a listed chemical can occur at a level that requires a warning" (Section 25600.1). The term "expose" is defined in Section 25102(i) and "environmental exposure" is defined in Section 25600.1(f). The phrases "clearly identify the area" and "reasonably associated with the location and source of the exposure" are not defined in the regulation because they are not terms-of-art specific to Proposition 65. The words used are intended to have their usual and customary meanings. For example, "area" can be defined as "... any particular extent of space or surface; part...a geographical region; tract...any section reserved for a specific function...a piece of unoccupied ground; an open space...the space or site on which a building stands; the yard attached to or surrounding a house."² The particular area in which an exposure to a listed chemical can occur must be determined by the person causing the exposure based on the particular facts associated with the exposure.

Under Proposition 65, it is the responsibility of the business causing the exposure to determine when a warning is required for a given exposure. Existing regulations provide guidance concerning determining when a given exposure requires a warning.³

Further, the definition of "environmental exposure" was modified to provide additional guidance concerning identifying sources of exposure (subsection 25600.1(f)). The warning should be provided close enough to the source of exposure in order for individuals seeing the warning to determine where and how they may be exposed.

² See <http://www.dictionary.com/browse/area?s=t>

³ Title 27, Cal. Code of Regs., section 25701 and 25801 et seq.

Examples of how a warning “clearly identify the area and source of the exposure and be provided in a manner that clearly associates it with the exposure can be found in the tailored warning section of the regulations (see Sections 25607.20 and 25607.21 (enclosed parking facilities), Sections 25607.24 and 25607.25 (petroleum products), Sections 25607.26 and 25607.27 (service stations and repair facilities), and Sections 25607.28 and 25607.29 (Designated Smoking Areas)).

**7. Subsection 25604(a)(3): Warnings published in newspapers
(FSOR, p. 127)**

Comment 212 (CAA): The response to the comment should be replaced with the following:

Response: OEHHA does not anticipate a circumstance where an apartment building would find it advantageous to provide a newspaper warning. Newspaper warnings have been a desirable option for industrial facilities that need to provide a warning to surrounding communities. Providing the warnings on a periodic basis helps ensure they are seen by the affected individuals prior to exposure. This method of providing warnings was carried over from the existing regulations (Section 25605.1(a)(4)).

A more appropriate method for providing a warning for exposures at apartments would be to post the warning near the source(s) of exposure at the facility, with the warning providing a map or schematic showing the area where an exposure to a listed chemical can occur. Examples of how a warning can “clearly identify the area and source of the exposure and be provided in a manner that clearly associates it with the exposure” can be found in the tailored warning section of the regulations (see Sections 25607.20 and 25607.21 (enclosed parking facilities), Sections 25607.24 and 25607.25 (petroleum products), Sections 25607.26 and 25607.27 (service stations and repair facilities), and Sections 25607.28 and 25607.29 (Designated Smoking Areas)).

OEHHA is considering an informal request for the development of a “tailored warning” pursuant to Section 25607, *et seq.* for exposures to listed chemicals in hotels and apartments, that will more specifically address the issues raised in this comment. No additional changes to the regulations were made based on this comment.

8. Section 25607.5: Food and Non-Alcoholic Beverage Exposure Warnings for Restaurants – Methods of Transmission (FSOR, p. 144)

The response to the comment should be replaced with the following:

Comment #257 (CRA): The commenter stated, in part, the phrase, "placed at each point of sale" is not clear. The commenter also requested an amendment to subsection (a)(2): "...each point of sale at or on the counter or on a wall behind, adjacent to, or parallel to the counter where customers place orders or pick up food or beverage items so as..." which is based on language in court-approved consent judgments filed by the Attorney General. The response indicated that to the extent warnings are being provided pursuant to a consent judgement, the terms of that judgement supersede the regulations. OEHHA also agreed that the point of sale would include placement of a sign at or on the counter or on a wall behind, adjacent to, or parallel to the counter where customers place orders or pick up food or beverage items. OEHHA declines to amend the regulation to include language used in court-approved settlements, as the phrase point-of-sale provides flexibility to businesses to place the warning at a location that fits their particular business. The proposed language would unnecessarily limit the potential locations for a business to provide "readable and conspicuous" warnings on notices or signs at point-of-sale locations in a restaurant.

9. Section 25607.10: Raw Wood Product Exposure Warnings – Methods of Transmission (FSOR, p. 147)

Comment #269 (Environmental Coalition): The commenter stated, in part, that there is an ambiguity about whether the regulation is aimed at consumer or employer purchasers of wood. The response from OEHHA indicated that the safe harbor provision expressly applies to raw wood sold as a "consumer product" at the retail level either as individual pieces or in bulk, although that phrase is not included in the regulatory text. To clarify, sections 25607.11 and 25607.12 expressly apply to "consumer product exposures to wood dust by drilling, sawing, sanding or machining raw wood products", which can include individual pieces of wood or wood sold in bulk. The warning methods in 25607.10(a)(1) and (2) are intended to apply to consumer product exposures to wood dust from raw wood sold in individual pieces or in bulk. In addition, as noted elsewhere in the FSOR, under subsection 25606(b) where occupational exposures to wood dust occur and no OSHA-compliant warning is being provided, a warning can be provided to affected workers using the content in Section 25607.11, but would need to be provided via a method that ensures the affected workers receive the warning prior to exposure, such as by posting the warning in the area where wood is being drilled, sanded or cut.

10. Miscellaneous or General Comments (FSOR, p. 166)

Comment #315 (CH&LA): OEHHA's guidance is faulty and inaccurate on several different levels. For years CH&LA provided its members with detailed information about listed chemicals likely present in a typical hotel and when and where exposures might occur that warrant a warning. OEHHA's position that relying on advice from a trade association is not sufficient for environmental exposures, but no rationale was provided for this position.

Response: The second sentence in the comment is not clear and OEHHA has not been able to locate a document reflecting that OEHHA took such a position. The commenter may be responding to comments made by OEHHA staff in stakeholder meetings regarding how an apartment or hotel owner might be able to determine what exposures may occur at a given facility. OEHHA is considering an informal request for the development of a "tailored warning" pursuant to Section 25607, *et seq.* for exposures to listed chemicals in hotels and apartments and may be able to address how to identify exposures that may occur at these facilities during that process. No change was made to the regulation in response to this comment.

11. Alternatives Determination (FSOR, p. 271)

The text in the FSOR should be replaced with the following:

In accordance with Government Code section 11346.9(a)(4), OEHHA has considered available alternatives to determine whether any alternative would be more effective in carrying out the purpose for which the regulations were proposed. OEHHA has also considered whether an alternative existed that would be as effective as, and less burdensome to, affected private persons than the proposed action. OEHHA has determined that no alternative considered would be more effective, or as effective and less burdensome to affected private persons, than the proposed regulations because the regulations will further the 'right-to-know' purposes of Proposition 65 by incorporating new technology, and provide warnings that will give consumers more information about potential exposures to listed chemicals. As shown in the economic impact assessment for the regulation, the changes are more cost-effective to affected private persons and equally effective in implementing the statutory law as the other alternatives considered. The regulations also provide businesses more compliance assistance in furtherance of the purposes of the Act.

Pursuant to Government Code section 11346.9(a)(4) and (5), OEHHA considered alternatives to the proposed regulations. One alternative considered was that OEHHA withdraw the entire regulatory proposal. OEHHA has determined that this is not a reasonable alternative because the existing regulations have become outdated and do not currently incorporate the changes in technology that have occurred in the 30 years

since Proposition 65 was passed, and individuals who may be exposed to listed chemicals would not be provided useful, informative, and updated warnings.

The now-withdrawn January 2015 regulatory proposal identified 12 listed chemicals or chemical groups that would have been required to be named in the warning if exposures to those chemicals were the reason for the warning. This alternative, it was argued, would result in costs for testing products or locations to determine if their warnings would need to name some of those chemicals. However, as modified, this regulation would require only that one or more chemicals for each endpoint covered by the warning be named in the warning. The choice of which chemical is named is left to the discretion of the business providing the warning. This should not trigger the need for any additional testing as businesses providing warnings have already ascertained that they are causing an exposure to at least one chemical and should know the identity of that chemical.

There were no small-business specific alternatives submitted during the rulemaking process.

12. Incorporation by Reference

Section 25606 incorporates by reference “all warning information, training and labeling requirements of the federal Hazard Communication Standard (29 Code of Federal Regulations, section 1910.1200, Feb. 8, 2013)”. A copy of 29 C.F.R. § 1910.1200 has been added to the rulemaking record and was available upon request during the rulemaking period. It would be cumbersome, unduly expensive, or otherwise impractical to publish this document in the California Code of Regulations.

13. Non-substantive Modifications to Regulatory Text

Several non-substantive modifications were made to the regulatory text during review of the regulations by the Office of Administrative Law. Section 25603.3(f) and (g) were added to Article 6 in an emergency action on April 18, 2016. The provisions were incorporated into the regulatory text but were renumbered to sections 25607.30 and 25607.31. These changes were non-substantive as the requirements for safe harbor warning methods and content described in these provisions were not altered. Specifically, Section 25603.3(f) was renumbered to Section 25607.30, and all subsequent subsections were renumbered to correspond with the renumbering of the section. In Section 25603.3(f)(1), the language “Notwithstanding any other provision of sections 25603, 25603.1, 25603.2, and 25603.3” was removed from this provision, as the cross-references in this provision were repealed in this action and were no longer valid or necessary.

In Section 25603.3(f)(1)(A)1., the cross-reference to Section 25603.2(a)2. was replaced by the actual language of Section 25603.2(a)2., as Section 25603.2(a)2. was repealed in this action. In Section 25603.3(f)(1)(A)2.c., the cross-reference to subsection (g) was changed to Section 25607.31 because subsection (g) was renumbered to Section 25607.31.

In Section 25603.3(f)(2), the cross-reference to subsection (1)(A)2. was changed to (a)(1)(B) to correspond with the internal renumbering of this section. The cross reference to subsection (g) was changed to Section 25607.31 because subsection (g) was renumbered to Section 25607.31. In Section 25603.3(f)(2)(A), the cross-reference to subsections (f) and (g) was changed to Section 25607.30 and Section 25607.31 because subsections (f) and (g) were renumbered to Section 25607.30 and Section 25607.31. In Section 25603.3(f)(3), the cross-reference to subsections (f) and (g) was also changed to Section 25607.30 and Section 25607.31. In Section 25603.3(f)(4), the cross reference to subsections (f) and (g) was also changed to Section 25607.30 and Section 25607.31.

Section 25603.3(g) was renumbered to Section 25607.31, and all subsections were renumbered to correspond with the renumbering of the section. In Section 25603.3(g)(1), the cross-reference to subsection (f)(3) was changed to Section 25607.30(c) to correspond with the renumbering of subsection (f)(3). The cross-reference to subsection (f)(4) was changed to Section 25607.30(d) to correspond with the renumbering of subsection (f)(4). The cross reference to subsection (g)(2) was changed to Section 25607.31(b) to correspond with the renumbering of subsection (g)(2).

The term “article” was revised to “subarticle” throughout the regulations for clarity. These revisions do not materially alter obligations under the regulations. The cross-reference to “Section 25607” was revised to “25607.1, et seq.” throughout the regulations as a short-hand to avoid unnecessarily listing all of the individual provisions under Section 25607, which is what was initially intended by the cross-reference to 25607 in the regulations. These revisions clarify the cross-reference to 25607 without materially altering the obligations under the regulations.

The first sentence in Section 25600(b), “This article will become effective two years after the date of adoption”, was withdrawn because it was determined that this language could be problematic to future amendments of the article, and the two-year effective date would be shown in the history notes under the sections of this article.

In Section 25600.2(c)(1), the term “the regulation” was changed to “this section” for clarity. This change does not materially alter the obligations under the regulations.

In Section 25600.2(e)(3), the cross-reference to subsections (b) and (c) was changed to subsection (b) because it was determined that subsection (c) was not applicable to this provision.

In Section 25600.2(g)(1), the reference to the lead agency was given its own subdivision number because the lead agency does not have authority to bring an action under the Act. The remainder of this provision was renumbered to subsection (g)(2). After the words “or any city attorney” the words “or city prosecutor” were added to be consistent with the Act.

In Section 25601(e), the last sentence was changed from “Such supplemental information may not be substituted for the warning content required by this article” to “Such supplemental information is not a substitute for the warning content required under this subarticle.” This is a grammatical change to clarify the intent of the provision and does not materially alter the obligations of the provision.

In Section 25602(b), the language “on the product display page” was removed because it was redundant.

Finally, multiple non-substantive changes were made for grammar, punctuation, cross-references, and authority and reference citations.